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ONLINE SALES TAX POLICY: A STUDY OF NEW YORK AND GEORGIA STATE  
LAWS AND THE FEDERAL MARKETPLACE FAIRNESS ACT

By  
Madison Elizabeth Coburn

A thesis submitted to the faculty of The University of Mississippi in partial fulfillment of  
the requirements of the Sally McDonnell Barksdale Honors College.

Oxford  
May 2014

Approved by

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## ABSTRACT

The physical presence standard for remote sales tax collection, established in 1967, remains the standard for sales tax collection today. Advances in technology have led to increases in online shopping. Online retailers act under the physical presence standard. Throughout the United States, many individual states are facing economic challenges either as a result of or in conjunction with states' inability to collect sales tax from some online vendors without a physical presence in the state. The challenges include loss of revenue due to uncollected online sales tax and lack of fairness for brick-and-mortar retailers that do remit sales tax to the state and for less affluent citizens unable to shop online. In order to combat these challenges, some states are redefining and expanding the meaning of physical presence in what are known as state "Amazon laws." New York and Georgia took this approach. At the federal level, the U.S. Senate's 2013 Marketplace Fairness Act attempted to enable states to collect online sales tax through origin sourcing, which does not redefine the physical presence standard. The U.S. House Judiciary Committee is currently working on alternatives to the Marketplace Fairness Act that accomplish the same goal of allowing states to collect remote sales tax without expanding the physical presence standard. In this study, I chose to examine the Marketplace Fairness Act and New York and Georgia's state "Amazon laws" in order to make a policy recommendation for Mississippi. I argue that Mississippi should implement a state online sales tax policy similar to New York and Georgia, while continuing to push for federal legislation like the Marketplace Fairness Act.

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## Chapter One: Introduction

According to Forbes Magazine, “In 1932, Mississippi was the first state to impose a general state sales tax.”<sup>1</sup> Today, however, Mississippi does not take part in online sales tax collection, which many other states are beginning to do as a result of these states’ expansion of the meaning of physical presence.<sup>2</sup> Physical presence, also known as nexus, is the standard by which states are allowed to collect sales taxes. In other words, states can only collect sales taxes if a vendor has a physical presence in that particular state. The states’ physical presence clause, established in 1967 through *National Bellas Hess v. Illinois Department of Revenue*, is defined state by state. The Mississippi Code of 1972, for example, states that a business has physical presence in Mississippi if the company has a warehouse, a store, an office, or a sales representative physically residing in the state.<sup>3</sup> The traditional physical presence standard as established over forty-five years ago is outdated as consumer-shopping habits are moving online. This has thus led to a lack of fairness, as sales tax is not collected by online companies without a physical presence in the state, even when their consumer base crosses state lines. In the midst of declining state revenues, increasing budget gaps, and changing consumer practices a

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<sup>1</sup> Wood, Robert W. "10 Surprising Facts About Online Sales Taxes." *Forbes*. Forbes Magazine, 11 Sept. 2012. Web. 06 Feb. 2013. <<http://www.forbes.com/sites/robertwood/2012/09/11/10-surprising-facts-about-online-sales-taxes/>>.

<sup>2</sup> Bogardus, Kevin. “Haley Barbour Lobbying for the Online Sales Tax He Championed in Office.” *The Hill*. 24 April 2012. Web. 06 February 2013. <<http://thehill.com/business-a-lobbying>>

<sup>3</sup> "Miss. Code Ann. § 27-67-3." *LexisNexis*. N.p., n.d. Web. 17 Apr. 2014. <<http://www.lexisnexus.com/hottopics/mscode/>>.

competitive advantage continues to persist for online sales retailers. A lack of fairness also persists for traditional brick-and-mortar retailers who are forced to collect and remit sales taxes to the state(s) in which they are located. Moreover, changing consumer practices, including an increase in online shopping has allowed many affluent citizens who have the ability to shop online to avoid paying sales tax on their online purchases.

Federal legislation, known as the Marketplace Fairness Act (MFA) of 2013, attempted to correct the issues that have resulted from an outdated physical presence standard for the collection of online sales tax. If this bill had passed in both houses of Congress, it would have enabled states to collect online sales tax, without an effect on nexus, unlike the state laws created for the purpose of online sales tax collection. Under the recently implemented online sales tax policies, states have expanded the meaning of physical presence, nexus, to include online affiliates who advertise online companies in that particular state. Under the Marketplace Fairness Act, however, states would have two options in order to be granted the authority to collect online sales tax. One of these options, which I will refer to as the mandate option, is outlined within the act with specific qualifications states must meet. A second option involves following regulatory policy within the Streamlined Sales and Use Tax Agreement (SSUTA) established by the Streamlined Sales Tax governing board, which has outlined ways for states to simplify their tax base. Both the mandate option and the SSUTA option create a more simplified and uniformed tax bases across different states.



On May 6<sup>th</sup>, 2013, The Marketplace Fairness Act passed in the Senate.<sup>4</sup> Sixty-nine members from both sides of the aisle came together in support of the Marketplace Fairness Act with the intent of leveling the playing field and establishing fairer competition practices between brick- and- mortar and online retailers.<sup>5</sup> The bill did not leave the House Judiciary Committee, however. According to the Congressional Research Service, “Until Congress decides otherwise, physical presence remains the standard” for the collection of Internet sales tax.<sup>6</sup> Because a stand-alone bill has yet to pass, states are redefining the meaning of physical presence in their state, so as to collect more revenue. Specifically, states are targeting giant retailer, Amazon, to collect sales tax, and these state policies are often referred to as “Amazon Laws.” Amazon is now required to collect sales tax in nineteen states.<sup>7</sup> These “Amazon laws” redefine the physical presence standard, which is why many of these states ended up in court regarding the constitutionality of such a bill.<sup>8</sup>

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<sup>4</sup> "S. 743: Marketplace Fairness Act of 2013." *GovTrack.us*. N.p., n.d. Web. 11 Sept. 2013. <<http://www.govtrack.us/congress/bills/113/s743/text>>.

<sup>5</sup> Morran, Chris. "Senate Signs Off On Marketplace Fairness Act; Online Sales Tax Inches Closer To Reality." *Consumerist*. The Consumerist, 6 May 2013. Web. 11 Sept. 2013. <<http://consumerist.com/2013/05/06/senate-signs-off-on-marketplace-fairness-act-online-sales-tax-inches-closer-to-reality/>>.

<sup>6</sup> Lunder, Erika K., and Carol A. Pettit. "'Amazon Laws' and Taxation of Internet Sales: Constitutional Analysis." *Congressional Research Service* (n.d.): n. pag. 3 Apr. 2013. Web. 25 Mar. 2013. <<http://www.fas.org/sgp/crs/misc/R42629.pdf>>

<sup>7</sup> Bensinger, Greg. "New Year Rings in Sales Tax for Amazon Shoppers in Three States." *The Wall Street Journal*. N.p., 1 Jan. 2014. Web. 10 Mar. 2014. <<http://blogs.wsj.com/digits/2014/01/01/new-year-rings-in-sales-tax-for-amazon-shoppers-in-three-states/>>. (Indiana, Nevada, and Tennessee)

<sup>8</sup> Yang, Jia Lynn. "Senate Planning Vote on Internet Sales Tax Bill." *Washington Post*. The Washington Post, 22 Apr. 2013. Web. 23 Apr. 2013. <[http://www.washingtonpost.com/business/economy/senate-planning-vote-on-internet-sales-tax-bill/2013/04/21/2eaaeb2-a933-11e2-8302-3c7e0ea97057\\_story.html](http://www.washingtonpost.com/business/economy/senate-planning-vote-on-internet-sales-tax-bill/2013/04/21/2eaaeb2-a933-11e2-8302-3c7e0ea97057_story.html)>.

I believe this is an important topic to explore due to the changing nature of our society. As technology capabilities increase, we must be able to adapt and utilize the monetary gains such an increase in technology allows. I was drawn to this issue for two main reasons. The first was my fascination with a topic that is so current with a wide range of problems and effects. In addition, I believe it is our government's responsibility to protect brick-and-mortar retailers. Not only do such retailers create jobs, they also provide our local economies with a sense of community. The second reason I was drawn to the issue of online sales taxes was my desire to learn about a way Mississippi could potentially increase our state budget. As a result of the present study, I believe Mississippi should work toward implementing a state sales tax policy similar to New York's and Georgia's, while also pushing for federal legislation such as the Marketplace Fairness Act. If a bill similar to the Marketplace Fairness Act is passed, then Mississippi should abandon our state sales tax policy and follow the guidelines of the Marketplace Fairness Act, as the federal policy actually gives states more power, since physical presence is not redefined, thus enabling sales tax collection from more online vendors than just those with a physical presence in the state.

In this project, I will first perform a review of literature of the Marketplace Fairness Act and "Amazon Laws," including the history of the Marketplace Fairness Act and physical presence standard, an overview of the Marketplace Fairness Act, and the views of proponents and opponents of this federal legislation. Within this review of literature, in Chapter Two, I will identify two states, New York and Georgia, and their approaches to collecting remote sales tax, while also framing the debate for and against such policies, known as "Amazon laws." Thirdly, I analyze and critique New York's and

Georgia's online sales tax policies through a political analysis. Next, I will perform a brief economic analysis to help me reach my recommendation for the state of Mississippi. Lastly, I will summarize my reasons for thinking that Mississippi should implement a state policy similar to that of New York and Georgia, while continuing to push for a federal policy that accomplishes the same goals as the Marketplace Fairness Act.

## Chapter Two: Review of Literature: The Marketplace Fairness Act and “Amazon Laws”

United States Senator Mike Enzi [R-WY] sponsored S.336.<sup>9,10</sup> This bill, known as the Marketplace Fairness Act, passed on March 23<sup>rd</sup> as part of the Senate’s 2014 budget plan. Though the bill’s passage was non-binding, as implementation requires the passage of a stand-alone bill, the March 23<sup>rd</sup> passage initially showed there was bipartisan support for this bill.<sup>11</sup> Eventually, on May 6<sup>th</sup>, 2013, The Marketplace Fairness Act passed in the Senate.<sup>12</sup> According to the Tax Foundation, “Identical bills (S.336 and H.R. 684) have been introduced in Congress which would grant each state the power to require collection of sales and use taxes by sellers with no physical presence in the state.”<sup>13</sup> These bills were introduced on February 14, 2013 and have bipartisan support. Representative Steve Womack [R-AR3] sponsored H.R. 684, the House counterpart to Senator Enzi’s bill, with the intent of leveling the playing field and establishing fairer competition practices between brick-and-mortar and online retailers. The Marketplace

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<sup>9</sup> “S. 336--113th Congress: Marketplace Fairness Act of 2013.” [www.GovTrack.us](http://www.govtrack.us/congress/bills/113/s336). 2013. April 15, 2013 <<http://www.govtrack.us/congress/bills/113/s336>>

<sup>10</sup> “H.R. 684--113th Congress: Marketplace Fairness Act of 2013.” [www.GovTrack.us](http://www.govtrack.us/congress/bills/113/hr684). 2013. April 15, 2013 <<http://www.govtrack.us/congress/bills/113/hr684>>

<sup>11</sup> Demery, Paul. "Online Sales Tax Wins Support in Congress." *Internet Retailer: Portal to E-Commerce Intelligence*. N.p., 25 Mar. 2013. Web. 26 Mar. 2013. <<http://www.internetretailer.com/2013/03/25/online-sales-tax-measure-voted-budget-bill>>.

<sup>12</sup> "S. 743: Marketplace Fairness Act of 2013." *GovTrack.us*. N.p., n.d. Web. 11 Sept. 2013. <<http://www.govtrack.us/congress/bills/113/s743/text>>.

<sup>13</sup> Henchman, Joseph. "Marketplace Fairness Act Introduced: Expands State Internet Sales Tax Authority with Some Simplifications." *Tax Foundation*. Tax Foundation, 28 Feb. 2013. Web. 20 Mar. 2013. <<http://taxfoundation.org>>.

Fairness Act had bipartisan support, and passed 69-27 in the Senate.<sup>14</sup> However, according to Virginia Congressman Bob Goodlatte, “It’s unlikely the House of Representatives will pass the Marketplace Fairness Act,” as it currently stands.<sup>15</sup> In fact, the House Judiciary Committee is currently working on an alternative to the Marketplace Fairness Act as passed by the Senate, according to Congressman Goodlatte.<sup>16</sup>

The Marketplace Fairness Act, “grants states the authority to compel online and catalog retailers, no matter where they are located, to collect sales tax at the time of transaction- exactly like local retailers are already required to do.”<sup>17</sup> There are two standards set forth through this act in which states must abide in order to be eligible to collect sales tax from online vendors. “Specifically, states seeking collection authority have two options for simplifying their sales tax laws,” according to the Marketplace Fairness Act’s website.<sup>18</sup> States have the option of meeting a five-part simplification mandate or adopting the measures set forth by the Streamlined Sales and Use Tax Agreement (SSUTA). If passed by both houses of Congress, this federal law will give states greater authority over their tax collection practices for online sales tax collection.

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<sup>14</sup> Morran, Chris. "Senate Signs Off On Marketplace Fairness Act; Online Sales Tax Inches Closer To Reality." *Consumerist*. The Consumerist, 6 May 2013. Web. 11 Sept. 2013. <<http://consumerist.com/2013/05/06/senate-signs-off-on-marketplace-fairness-act-online-sales-tax-inches-closer-to-reality/>>.

<sup>15</sup> Martin, Aaron. "Goodlatte Says House Likely Won't Pass Senate's Internet Tax Bil - WLSL 10 NBC in Roanoke/Lynchburg Va." *WLSL10- NBC*. N.p., 20 June 2013. Web. 11 Sept. 2013. <<http://www.wsls.com/story/22518230/goodlatte-says-house-wont-pass-internet-sales-tax-bill>>.

<sup>16</sup> Ibid.

<sup>17</sup> “What Is The Marketplace Fairness Act?” *Marketplace Fairness Act*. Web. 06 February 2013. <<http://marketplacefairness.org>>.

<sup>18</sup> Ibid

In this literature review I will first introduce the issue of sales tax collection on a national scale, describing the history of the Marketplace Fairness Act of 2013. Next, I will show what led to the creation and support of a federal policy that grants states the authority to collect remote sales tax. This motivation for change includes economic conditions, the opportunity to increase state revenues, and fairness for brick-and-mortar retailers. Next, I will review the background of the “physical presence,” or nexus standard, as utilized by courts in their rulings regarding the collection of interstate sales tax. I will then examine the policy set forth through the Marketplace Fairness Act by discussing the physical presence rule and proponents and opponents of the act. Lastly, in an attempt to begin to make policy recommendations for the state of Mississippi regarding the collection of online sales tax, I will examine two states’ policies that allow the state to collect sales tax from online vendors in lieu of the Marketplace Fairness Act. I will examine New York and Georgia.

## **2.1 History of the Marketplace Fairness Act of 2013**

According to the Tax Foundation, “The ‘Marketplace Fairness Act’ (S. 336 and H. R. 684) is the latest step of a lengthy and rigorous effort to expand state tax authority beyond historical limits, increase state revenues, end an economically unjustifiable tax treatment disparity between brick-and-mortar retail sales and online/catalog sales, and bring about uniformity and perhaps even simplification in the nation’s byzantine sales tax

system.”<sup>19</sup> Similar bills have been introduced in the past, although various components caused these proposed bills to stall. Two such bills introduced in Congress in 2011, include The Main Street Fairness Act and the Marketplace Equity Act.<sup>20</sup> The Main Street Fairness Act was introduced first on July 29, 2011, followed by the Marketplace Equity Act of 2011, which was introduced on October 13, 2011. These two bills were similar in their purpose, but not identical. The purpose of the Main Street Fairness Act was “to promote simplification and fairness in the administration and collection of sales and use taxes.”<sup>21, 22</sup> The purpose of the Marketplace Equity Act was “to improve the State’s rights to enforce the collection of State sales and use tax laws, and for other purposes.”<sup>23</sup> Moving toward a goal of greater state authority, these two bills varied greatly in the

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<sup>19</sup> Henchman, Joseph. "Marketplace Fairness Act Introduced: Expands State Internet Sales Tax Authority with Some Simplifications." *Tax Foundation*. Tax Foundation, 28 Feb. 2013. Web. 20 Mar. 2013. <<http://taxfoundation.org>>.

<sup>20</sup> Dion, Sylvia F. "The Marketplace Equity Act: The New Competition on the Block." *Sales Tax Support*. Sales Tax Support, 25 Oct. 2011. Web. 24 Mar. 2013. <<http://www.salestaxsupport.com>>.

<sup>21</sup> United States. Cong. House of Representatives. 112<sup>th</sup> Congress, 1<sup>st</sup> session. H.R. 2701, *A Bill to Promote Simplification and Fairness in the Administration and Collection of Sales and Use Taxes* [introduced in the U.S. House of Representatives; 29 July 2011]. 112<sup>th</sup> Congress., 1<sup>st</sup> sess. Congressional Bill, GPO Access. Web. 15 April 2014. <<http://www.gpo.gov/fdsys/pkg/BILLS-112hr2701ih/pdf/BILLS-112hr2701ih.pdf>>

<sup>22</sup> United States. Cong. Senate. 112<sup>th</sup> Congress, 1<sup>st</sup> session. S. 1452, *A Bill to Promote Simplification and Fairness in the Administration and Collection of Sales and Use Taxes* [introduced in the U.S. Senate; 29 July 2011]. 112<sup>th</sup> Congress., 1<sup>st</sup> sess. Congressional Bill, GPO Access. Web. 15 April 2014. <<http://www.gpo.gov/fdsys/pkg/BILLS-112s1452is/pdf/BILLS-112s1452is.pdf>>

<sup>23</sup> United States. Cong. House of Representatives. 112<sup>th</sup> Congress, 1<sup>st</sup> session. H.R. 3179 *A Bill to Improve the States’ Rights to Enforce the Collection of State Sales and Use Tax Laws, and for other Purposes*. [introduced in the U.S. House of Representatives; 13 October 2011]. 112<sup>th</sup> Congress., 1<sup>st</sup> sess. Congressional Bill, GPO Access. Web. 15 April 2014. <<http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg75308/pdf/CHRG-112hhrg75308.pdf>>

requirement section that enables states to collect remote sales tax. The Main Street Fairness Act required states be full members of the Streamlined Sales and Use Tax Association (SSUTA), while the Marketplace Equity Act required that states meet the simplification guidelines as outlined in the bill. The two bills were similar in that neither had an effect on nexus. They were also similar in the fact that neither of these bills made it out of committee.<sup>24, 25, 26</sup> As a result, a group of bipartisan supporters introduced the Marketplace Fairness Act in early 2013. A key difference between this act and the two introduced in 2011 is the way in which states can qualify to be given the authority to collect remote sales tax. In the Marketplace Fairness Act, states can either become a full member of the SSUTA or can meet the simplification guidelines as outlined in the bill. This is a shift from both 2011 e-fairness bills.<sup>27, 28</sup>

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<sup>24</sup> United States. Cong. House of Representatives. 112<sup>th</sup> Congress, 1<sup>st</sup> session. H.R. 2701, *A Bill to Promote Simplification and Fairness in the Administration and Collection of Sales and Use Taxes* [introduced in the U.S. House of Representatives; 29 July 2011]. 112<sup>th</sup> Congress., 1<sup>st</sup> sess. Congressional Bill, GPO Access. Web. 15 April 2014. <<http://www.gpo.gov/fdsys/pkg/BILLS-112hr2701ih/pdf/BILLS-112hr2701ih.pdf>>

<sup>25</sup> United States. Cong. Senate. 112<sup>th</sup> Congress, 1<sup>st</sup> session. S. 1452, *A Bill to Promote Simplification and Fairness in the Administration and Collection of Sales and Use Taxes* [introduced in the U.S. Senate; 29 July 2011]. 112<sup>th</sup> Congress., 1<sup>st</sup> sess. Congressional Bill, GPO Access. Web. 15 April 2014. <<http://www.gpo.gov/fdsys/pkg/BILLS-112s1452is/pdf/BILLS-112s1452is.pdf>>

<sup>26</sup> United States. Cong. House of Representatives. 112<sup>th</sup> Congress, 1<sup>st</sup> session. H.R. 3179 *A Bill to Improve the States' Rights to Enforce the Collection of State Sales and Use Tax Laws, and for other Purposes*. [introduced in the U.S. House of Representatives; 13 October 2011]. 112<sup>th</sup> Congress., 1<sup>st</sup> sess. Congressional Bill, GPO Access. Web. 15 April 2014. <<http://www.gpo.gov/fdsys/pkg/CHRG-112hrg75308/pdf/CHRG-112hrg75308.pdf>>

<sup>27</sup> United States. Cong. Senate. 113<sup>th</sup> Congress, 1<sup>st</sup> session. S. 336, *A Bill to Restore States' Sovereign Rights to Enforce State and Local Sales and Use Tax Laws* [introduced in the U.S. Senate; 14 February 2013]. 113<sup>th</sup> Congress., 1<sup>st</sup> sess. Congressional Bill, GPO Access. Web. 15 April 2014. <<http://www.gpo.gov/fdsys/pkg/BILLS-113s336is/pdf/BILLS-113s336is.pdf>>



All three bills share some commonalities. These commonalities include no effect on nexus and a small seller exemption. In other words, these bills did not attempt to redefine physical presence, and do not require small businesses under a certain revenue cap to require the collection of online sales taxes. Ultimately, though the purpose may be worded differently bill to bill, the goal of all three pieces of legislation is to grant states the authority to collect a sales tax owed to them in order to increase state revenue and create a fairer environment for competition between online retailers and brick-and-mortar companies.

## **2.2 History of the “Physical Presence” Standard**

In the 113<sup>th</sup> Congress’ first session, the Marketplace Fairness Act (S. 336, H.R. 684) was outlined. This act allows states to collect sales tax from online retailers, regardless of if the said retailer has physical presence in the state.<sup>29</sup> In other words, the Marketplace Fairness Act has no effect on nexus, and instead outlines another standard of sales tax collection through online transactions. Prior to the introduction of this bill, the physical presence clause stood as the official guideline for online sales tax collection.<sup>30</sup> The physical presence standard, established through two Supreme Court Cases, *National*

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<sup>28</sup> United States. Cong. House of Representatives. 113<sup>th</sup> Congress, 1<sup>st</sup> session. H.R. 684., *A Bill to Restore States’ Sovereign Rights to Enforce State and Local Sales and Use Tax Laws* [introduced in the U.S. Senate; 14 February 2013]. 113<sup>th</sup> Congress., 1<sup>st</sup> sess. Congressional Bill, GPO Access. Web. 15 April 2014.

<<http://www.gpo.gov/fdsys/pkg/BILLS-113s336is/pdf/BILLS-113s336is.pdf>>

<sup>29</sup> "What Is the Marketplace Fairness Act?" *Marketplace Fairness Act*. Marketplace Fairness Act, n.d. Web. 28 Feb. 2013. <<http://www.marketplacefairness.org>>.

<sup>30</sup> “S. 336--113th Congress: Marketplace Fairness Act of 2013.” [www.GovTrack.us](http://www.govtrack.us). 2013. March 27, 2013 <<http://www.govtrack.us/congress/bills/113/s336>>

*Bellas Hess v. Illinois Department of Revenue* and *Quill Corp. v. North Dakota*, is defined in Mississippi by the Mississippi Code of 1972, as a company with a warehouse, a store, an office, or a sales representative physically present in the state.<sup>31, 32</sup> Other states have a similar definition of the physical presence standard.

The road that led to the creation of the bipartisan Marketplace Fairness Act was long, as the physical presence standard to collect sales taxes between interstate lines was established through *National Bellas Hess v. Illinois Department of Revenue* in 1967. In this case a mail order house from Kansas, National Bellas Hess, appealed a previous case in which Illinois brought suit against the mail order for not allowing the state to collect sales taxes from their business. The court ruled that “the test (of) whether an out-of-state business must comply with a state levy is variously formulated: ‘whether the state has given anything for which it can ask return’; whether the out-of-state business enjoys the protection or benefits of the State; whether there is a sufficient nexus: ‘some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.’”<sup>33</sup> An example of such a connection could include something as definite as a storefront in some particular state or something less obvious as a company owned warehouse.

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<sup>31</sup> "What Is the Marketplace Fairness Act?" *Marketplace Fairness Act*. Marketplace Fairness Act, n.d. Web. 28 Feb. 2013. <<http://www.marketplacefairness.org>>.

<sup>32</sup> "Miss. Code Ann. § 27-67-3." *LexisNexus*. N.p., n.d. Web. 17 Apr. 2014. <<http://www.lexisnexus.com/hottopics/mscode/>>

<sup>33</sup> *National Bellas Hess, Incorporated, Appellant, v. Department of Revenue of the State of Illinois*. United States Supreme Court, 1967.

In 1992 in the U.S. Supreme Court Case *Quill Corp. v North Dakota*, which was very similar to the 1967 case, the Supreme Court upheld the 1967 ruling with an 8- 1 majority vote. The court ruled:

[O]ur decision is made easier by the fact that the underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve. No matter how we evaluate the burdens that use taxes impose on interstate commerce, Congress remains free to disagree with our conclusions” (emphasis added).<sup>34</sup>

In this case, “Quill (was) a Delaware corporation with offices and warehouses in Illinois, California, and Georgia. None of its employees worked or resided in North Dakota, and its ownership of tangible property in that State was either insignificant or nonexistent.”<sup>35</sup> North Dakota law stated that the government could collect taxes from any retailer soliciting the consumer market of North Dakota. The decision made in this case upholds the “physical presence” standard, but also includes less concrete connection between interstate retailers as a basis for the collection of sales tax. This decision was made because the court followed the precedent of *Bellas Hess v. Illinois*, and established that the burden was too great on businesses to collect online sales taxes due to the complicated nature of such a collection.

For this reason, over twenty years later, bipartisan Congressional proponents of a fairer marketplace and increased state revenue continue to try and create the best possible

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<sup>34</sup> "What Is the Marketplace Fairness Act?" *Marketplace Fairness Act*. Marketplace Fairness Act, n.d. Web. 28 Feb. 2013. <<http://www.marketplacefairness.org>>.

<sup>35</sup> *Quill Corp v. North Dakota*. United States Supreme Court, 1992.

policy to meet both of these important goals, namely increasing state revenues and creating a fairer marketplace.

## **2.3 Motivation for the Creation and Support of the Marketplace**

### **Fairness Act**

According to the Marketplace Fairness Act's website, "Since *Bellas Hess* [*v. Illinois*], out-of-state retailers have been shielded from the obligation to collect sales tax, based purely on the notion that it would place too much of a burden on their businesses."<sup>36</sup> Since that time, economic change has spurred policymakers to consider ways in which states can collect remote sales tax, considering the average state depends on the collection of sales tax for thirty-four percent of their total revenue, according to the US Census Bureau, Tax Foundation calculations.<sup>37</sup> In addition, traditional brick-and-mortar companies are calling for fairness in the marketplace. More traditional companies feel as though they are at a significant disadvantage in the marketing and selling of their products since they are forced to collect sales tax, yet hugely successful companies such as Amazon are not. This section examines the motivation behind why states, businesses, and many policymakers called for change in recent years regarding the collection of remote sales tax. In all, this section examines the motivation for changing the "physical presence" standard as first established by *Bellas Hess. v. Illinois* in 1967.

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<sup>36</sup> "What Is The Marketplace Fairness Act?" *MARKETPLACE FAIRNESS ACT*. Web. 06 February 2013. <<http://marketplacefairness.org>> .

<sup>37</sup> Malm, Elizabeth, and Ellen Kant. "The Sources of State and Local Tax Revenues." *Tax Foundation*. N.p., 28 Jan. 2013. Web. 15 Mar. 2013. <<http://taxfoundation.org/article/sources-state-and-local-tax-revenues>>.

In early 2008, the United States entered into a severe recession, so severe that the United States has yet to fully recover. Most agree that the recession began when the housing bubble burst in 2007, which led “to a high rate of defaults on subprime mortgages, (which) then led to a banking crisis that fall....But right about here, the agreement ends.”<sup>38</sup> For the purpose of this project however, why a great recession occurred in 2008 is not what is important. What is important is that such a recession did occur and that it greatly impacted the world economy, the United States, individual states, and individual households.

The economic conditions set forth from the recession that occurred in 2008 explain, in part, why policymakers called for a revision of policies regarding the collection of remote sales tax. For one, the national real median income fell 1.2 percent from 2007 to 2008.<sup>39</sup> The deep southern states of Mississippi, Alabama, and Arkansas held the lowest median household income, although California, Florida, and Michigan had the highest rates of unemployment following the 2008 recession.<sup>40</sup> In addition, the number of uninsured Americans increased by about 600,000, or 15.4 percent of the population, in 2008. Moreover, greater social inequality resulted from this decline, as there was a decline in the average household’s standard of living.<sup>41</sup>

According to the *New York Fed Journal, Current Issues in Economics and Finance*, “The fiscal stress has been particularly acute in states that have relied heavily on

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<sup>38</sup> Weisberg, Jacob. "What Caused The Great Recession?." Newsweek 155.3 (2010): 19. Academic Search Premier. Web. 21 Mar. 2013.

<sup>39</sup> White, Jerry. "World Socialist Web Site." *US: 2008 Census Figures Show Severe Impact of Recession on Workers* -. World Socialist Web Site, 23 Sept. 2009. Web. 12 Mar. 2013. <<http://www.wsws.org/en/articles/2009/09/lead-s23.html>>.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

tax revenues from economic sectors hit hard by the recession.”<sup>42</sup> In general, a state’s tax revenue is derived from a combination of individual income tax, corporate income tax, general sales tax, and other various taxes. “The extent to which a state’s revenue falls when economic activity declines has been the subject of extensive literature, much of it focused on general sales tax.”<sup>43</sup> Thus, the declining economic conditions due to the 2008 recession caused a decrease in general sales tax, which in turn led to a decline in many state revenues. Decreased revenues strained the states that depend on sales tax to make up so much of the revenue utilized in state budgets. New York is an example of a state that severely suffered due to the economic conditions that came out of 2008, in part because of their dependence on sales tax. *The New York Fed Journal, Current Issues in Economics and Finance* said, “a gap of roughly \$16 billion emerged in New York State’s 2010 budget in early 2009, when projected tax revenues were revised downward as the economy sank into deeper recession.”<sup>44</sup> This is just one of many states severely impacted by the recession, and helps to explain why policymakers in states that are heavily dependent on tax to make up their revenues called for a change to collect remote sales tax; thus allowing themselves to collect more taxes.

Policymakers in many states see the collection of remote sales tax as a means to increase their state revenue, and further improve economic conditions. The 1930s were an era of declining revenues, so in 1932, Mississippi was the first state to implement a general sales tax to combat the declining economic conditions. Twenty-three other states

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<sup>42</sup> Deitz, Richard, Andrew F. Haughwout, and Charles Steindel. "The Recession's Impact on the State Budgets of New York and New Jersey." *Current Issues in Economics and Finance* 16.6 (2010): 1-11. *Current Issues in Economics and Finance*. Web. 9 Mar. 2013. <[http://www.newyorkfed.org/research/current\\_issues/ci16-6.pdf](http://www.newyorkfed.org/research/current_issues/ci16-6.pdf)>.

<sup>43</sup> Ibid.

<sup>44</sup> Ibid.

followed Mississippi's lead soon after.<sup>45</sup> Naturally, because today we too are experiencing economic hardships, it makes sense that policymakers would look for ways to increase state revenues. The way many states are trying to accomplish this is through the implementation of policy that allows states to collect remote sales tax. According to *The Washington Post*, "A University of Tennessee study estimates that the District [of Columbia] would gain \$72.5 million in unpaid sales tax. Maryland is projected to add an extra \$375.9 million in tax revenue, and Virginia could see gains of \$422.6 million."<sup>46</sup> These are just a few projections that illustrate how much revenue is being lost due to online consumer purchases. Such projections encourage policymakers to act after seeing how dramatic an increase might be if remote sales tax could be collected. Former Mississippi Governor Haley Barbour's principal at his lobbying firm, BGR, said, "I think what (Governor Barbour) would say is it's not an online sales tax, but it's allowing states to enforce their own sales tax laws and collect revenue that is owed to them."<sup>47</sup>

Another motivation to change the current tax policy is in part due to fairness in the marketplace between brick-and-mortar retailers and online retailers. Often this is referred to as e-fairness. Many believe that without policies allowing states to collect sales tax from online vendors, brick-and-mortar retailers are at a significant

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<sup>45</sup> Maguire, Steven. "State Taxation of Internet Transactions." *Congressional Research Service* (2011): 1-16. Web. 26 Feb. 2013.

<sup>46</sup> Bhattarai, Abha. "Tax may Follow Shoppers Online Soon , Sales Taxes may Follow Shoppers to the Web Soon , Sales Taxes may Follow Shoppers to the Web." *The Washington Post*, sec. METRO: T14. August 9 2012. Web.

<sup>47</sup> Bogardus, Kevin. "Haley Barbour Lobbying for the Online Sales Tax He Championed in Office." *The Hill*. N.p., 24 Apr. 2012. Web. 24 Feb. 2013. <<http://thehill.com/business-a-lobbying/223213-barbour-lobbying-for-the-online-sales-tax-he-championed-in-office->>.

disadvantage.<sup>48</sup> Many local businesses are in support of such policies to better their competitive edge against huge online retailers. Thus, fairness in the marketplace is another claim pushing policy makers into greater support of the Marketplace Fairness Act.

## **2.4 The Marketplace Fairness Act**

It is estimated that \$20 billion in sales tax revenue is lost every year throughout the country due to online purchases.<sup>49</sup> According to the Tax Foundation, there are three options to solve this problem, and collect sales tax owed to the government by consumers. "Proposed solutions include origin sourcing (taxing based on the seller's location, rather than the buyer's), a national online sales tax...and the approach taken by [The Marketplace Fairness Act]."<sup>50</sup> The purpose of the Marketplace Fairness Act is "to restore States' sovereign rights to enforce State and local sales and use tax laws, and for other purposes."<sup>51, 52</sup> If enacted as the bill currently stands, the forty-five states that

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<sup>48</sup> "RILA Conference." *E-Fairness*. N.p., n.d. Web. 22 Mar. 2013.

<<http://www.rila.org/governmentaffairs/public-policy/Pages/e-fairness.aspx>>.

<sup>49</sup> Souppouris, Aaron. "The Verge." *The Verge*. The Verge, 23 Mar. 2013. Web. 26 Mar. 2013. <<http://www.theverge.com/2013/3/23/4138388/us-senate-marketplace-fairness-act-of-2013-symbolic-vote-results-internet-sales-tax>>

<sup>50</sup> Henchman, Joseph. "Marketplace Fairness Act Introduced: Expands State Internet Sales Tax Authority with Some Simplifications." *Tax Foundation*. Tax Foundation, 28 Feb. 2013. Web. 26 Mar. 2013. <<http://taxfoundation.org/blog/marketplace-fairness-act-introduced-expands-state-internet-sales-tax-authority-some-simplifications>>.

<sup>51</sup> United States. Cong. Senate. 113<sup>th</sup> Congress, 1<sup>st</sup> session. S. 336, *A Bill to Restore States' Sovereign Rights to Enforce State and Local Sales and Use Tax Laws* [introduced in the U.S. Senate; 14 February 2013]. 113<sup>th</sup> Congress., 1<sup>st</sup> sess. Congressional Bill, GPO Access. Web. 15 April 2014. <<http://www.gpo.gov/fdsys/pkg/BILLS-113s336is/pdf/BILLS-113s336is.pdf>>



collect sales tax and the District of Columbia would be able to require retailers to collect sales tax whether they have a physical presence in the state or not.<sup>53</sup> Although “The Marketplace Fairness Act grants states the authority to compel online and catalog retailers (“remote sellers”), no matter where they are located, to collect sales tax at the time of a transaction...there is a caveat: States are only granted this authority after they have simplified their sales tax laws.”<sup>54</sup> An example of how tax laws can be very complicated state to state and municipality-to-municipality is the sin tax. This sin tax is placed on items such as cigarettes or alcohol in many states. Because not every state employs such a tax, collection of such taxes can become complicated at the federal level. For example, beer in Mississippi “is subject to an excise tax of 42.68 cents per gallon,” while Tennessee has the highest beer tax in the nation.<sup>55, 56</sup> This simplification requirement is essential to make multistate sales tax collection possible. States seeking the authority to collect sales taxes would have two options under the Marketplace Fairness Act that would enable them to be granted the power to collect sales tax from

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<sup>52</sup> United States. Cong. House of Representatives. 113<sup>th</sup> Congress, 1<sup>st</sup> session. H.R. 684., *A Bill to Restore States’ Sovereign Rights to Enforce State and Local Sales and Use Tax Laws* [introduced in the U.S. Senate; 14 February 2013]. 113<sup>th</sup> Congress., 1<sup>st</sup> sess. Congressional Bill, GPO Access. Web. 15 April 2014.  
<<http://www.gpo.gov/fdsys/pkg/BILLS-113s336is/pdf/BILLS-113s336is.pdf>>

<sup>53</sup> Demery, Paul. "Online Sales Tax Wins Support in Congress." *Internet Retailer: Portal to E-Commerce Intelligence*. N.p., 25 Mar. 2013. Web. 26 Mar. 2013.  
<<http://www.internetretailer.com/2013/03/25/online-sales-tax-measure-voted-budget-bill>>.

<sup>54</sup> "What Is the Marketplace Fairness Act?" *Marketplace Fairness Act*. Marketplace Fairness Act, n.d. Web. 28 Feb. 2013. <<http://www.marketplacefairness.org>>.

<sup>55</sup> "Tobacco, Beer, and Alcohol." *Department of Revenue: State of Mississippi*. N.p., 14 Apr. 2014. Web. 14 Apr. 2014.  
<<http://www.dor.ms.gov/info/faqs/TobaccoBeerandAlcohol.html#a>>.

<sup>56</sup> Humphrey, Tom. "Tennessee Beer Tax Is Nation's Highest." *Knoxville News Sentinel*. N.p., 4 Feb. 2009. Web. 14 Apr. 2014.  
<<http://www.knoxnews.com/news/2009/feb/04/tennessee-beer-tax-is-nations-highest/>>.

remote sellers.<sup>57</sup> The first option grants each full member state under the Streamlined Sales and Use Tax Agreement (SSUTA) the authority to collect remote sales tax.<sup>58,59</sup>

“Any state which is in compliance with the SSUTA and has achieved Full Member Status as a SSUTA implementing state will have collection authority on the first day of the calendar quarter that is at least 90 days after enactment.”<sup>60</sup> The SSUTA was created to fulfill this roll of simplifying the collection of sales tax over a decade ago.

According to Scott Peterson, executive director of the Streamlined Sales Tax Governing Board, “In 1999 the National Governors Association and National Conference of State legislatures requested tax administrators to develop a sales tax system that is less complex, addresses unlevel playing field for merchants, (and) addresses loss of revenue from states unable to collect taxes already imposed.”<sup>61</sup> In order to address the issues of an unlevel playing field for merchants and states inability to collect online sales taxes, as well as provide the opportunity for states to develop a simplified way to collect online sales taxes, the Streamlined Sales and Use Tax Agreement (SSUTA) was created. In an effort to harmonize sales tax collection, the member states of this agreement hoped that

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<sup>57</sup> Ibid.

<sup>58</sup> United States. Cong. Senate. 113<sup>th</sup> Congress, 1<sup>st</sup> session. S. 336, *A Bill to Restore States’ Sovereign Rights to Enforce State and Local Sales and Use Tax Laws* [introduced in the U.S. Senate; 14 February 2013]. 113<sup>th</sup> Congress., 1<sup>st</sup> sess. Congressional Bill, GPO Access. Web. 15 April 2014. <<http://www.gpo.gov/fdsys/pkg/BILLS-113s336is/pdf/BILLS-113s336is.pdf>>

<sup>59</sup> United States. Cong. House of Representatives. 113<sup>th</sup> Congress, 1<sup>st</sup> session. H.R. 684., *A Bill to Restore States’ Sovereign Rights to Enforce State and Local Sales and Use Tax Laws* [introduced in the U.S. Senate; 14 February 2013]. 113<sup>th</sup> Congress., 1<sup>st</sup> sess. Congressional Bill, GPO Access. Web. 15 April 2014. <<http://www.gpo.gov/fdsys/pkg/BILLS-113s336is/pdf/BILLS-113s336is.pdf>>

<sup>60</sup> "What Is the Marketplace Fairness Act?" *Marketplace Fairness Act*. Marketplace Fairness Act, n.d. Web. 28 Feb. 2013. <<http://www.marketplacefairness.org>>.

<sup>61</sup> Peterson, Scott. Powerpoint.

such an effort would allow Congress to see the requirements set in place as prerequisites and thus, consider a plan for states to collect sales tax from online vendors.<sup>62</sup> The group in which the SSUTA was created is known as the Streamlined Sales and Use Tax Project (SSTP). Today, the Streamlined Sales Tax governing board governs the SSUTA. Forty-three states and the District of Columbia created this project in 2000. On October 1, 2005 the SSUTA plan went into action, disbanding the SSTP. Ultimately, the SSUTA outlines ten points. These focal points can be condensed and grouped into four general simplification practices: “(1) state level administration, (2) uniform tax base, (3) simplified tax rates, and (4) uniform sales sourcing rules.”<sup>63</sup> This system is not perfect, but it does simplify the tax system.

According to a report by the *Congressional Research Service* regarding the “State Taxation of Internet Transactions,” “The tax base and tax rate determine how much revenue is generated by the sales tax for each jurisdiction.”<sup>64</sup> These two components comprise what makes up a sales tax. A tax base includes all items or services that are subject to the collection of sales tax. In most cases, sales tax is only applied to “the transfer of tangible personal property, as expenditures on most services are typically excluded from the state sales tax base. In addition, in most states (34) and the District of Columbia, groceries are also exempt from state and local sales taxes or taxed at a lower rate.”<sup>65</sup> What each state includes within its tax base varies state to state. “The SSUTA includes a section requiring that within each state, all jurisdictions use the same tax base. Thus, if the state excludes groceries from the sales tax, all local governments within the

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<sup>62</sup> Maguire, Steven. “State Taxation of Internet Transactions.” *Congressional Research Service*. 7 June 2011. Web. <[www.crs.gov](http://www.crs.gov)>.

<sup>63</sup> Ibid.

<sup>64</sup> Ibid.

<sup>65</sup> Ibid.

state must also exclude groceries.”<sup>66</sup> A tax rate is the rate that is applied to the tax base. “In 34 states, local governments piggy-back a local sales tax (which often varies among localities within the state) on the state sales tax; 11 states and the District of Columbia levy a single tax rate, with no local taxes.” “In many states, local jurisdictions tax goods at different rates. This complication is mostly remedied under the SSUTA, as each state would be permitted only one state tax rate (with an exception for a second state rate on food and drugs).”<sup>67</sup>

Alternatively, states can meet simplification requirements as outlined in The Marketplace Fairness Act. Upon enacting legislation to exercise the authority granted by the Marketplace Fairness Act, these minimum simplification requirements include:

1. The provision of “a single entity within the state responsible for all state and local sales and use tax administration, return processing, and audits for remotes sales sourced to the state.”
2. Provision of a uniform sales and use tax base for the state.
3. “The location to which a remote sale is sourced refers to the location where the item sold is received by the purchaser, based on the location indicated by instructions for delivery that the purchaser furnishes to the seller,” according to the definition as provided in the bill for sourcing.
4. The provision of “information indicating the taxability of products and services,” “software free of charge for remote sellers that calculates sales and use taxes due on each transaction,” “certification procedures for persons to be approved as certified software providers.”

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<sup>66</sup> Ibid.

<sup>67</sup> Ibid.

5. “Relieve remote sellers from liability to the State or locality for the incorrect collection, remittance, or noncollection of sales and use taxes...if the liability is a result of an error or omission made by a certified software provider,” or “if the liability is the result of incorrect information or software provided by the state.”
6. “Relieve certified software providers from liability to the State or locality for the incorrect collection, remittance, or noncollection of sales and use taxes...if the liability is a result of misleading or inaccurate information provided by a remote seller,” or “if the liability is the result of incorrect information or software provided by the state.”
7. The provision must also be met that remote sellers and certified software providers have a notice of ninety days if rates change.<sup>68, 69</sup>

Furthermore, the Marketplace Fairness Act allows for a small seller exemption. This exemption prohibits states from collecting sales and use tax from remote sellers in the United States that have in the previous calendar year made sales of \$1,000,000 or less. The Act also provides limitations to the states that have been granted the authority to collect remote sales tax. These limitations include licensing and regulatory requirements, general limitations such as forcing a seller to pay any type of tax other than

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<sup>68</sup> United States. Cong. Senate. 113<sup>th</sup> Congress, 1<sup>st</sup> session. S. 336, *A Bill to Restore States’ Sovereign Rights to Enforce State and Local Sales and Use Tax Laws* [introduced in the U.S. Senate; 14 February 2013]. 113<sup>th</sup> Congress., 1<sup>st</sup> sess. Congressional Bill, GPO Access. Web. 15 April 2014. <<http://www.gpo.gov/fdsys/pkg/BILLS-113s336is/pdf/BILLS-113s336is.pdf>>

<sup>69</sup> United States. Cong. House of Representatives. 113<sup>th</sup> Congress, 1<sup>st</sup> session. H.R. 684., *A Bill to Restore States’ Sovereign Rights to Enforce State and Local Sales and Use Tax Laws* [introduced in the U.S. Senate; 14 February 2013]. 113<sup>th</sup> Congress., 1<sup>st</sup> sess. Congressional Bill, GPO Access. Web. 15 April 2014. <<http://www.gpo.gov/fdsys/pkg/BILLS-113s336is/pdf/BILLS-113s336is.pdf>>

sales or use taxes. This Act has no effect on nexus, allows no new tax, has no effect on intrastate sales and no effect on mobile telecommunications 14 Sourcing Act. The Marketplace Fairness Act also outlines specific definitions crucial to the understanding and language of the bill, such as ‘member state,’ ‘person,’ or ‘remote seller.’<sup>70</sup>

## **2.5 Proponents and Opponents of the Marketplace Fairness Act**

According to The Marketplace Fairness Act’s website as of April 2013, “The Marketplace Fairness Act enjoys bipartisan support from 78 members of Congress (30 Senators and 48 Representatives), 29 Governors (17 Republican, 11 Democrat, 1 Independent), a large number of National Trade Associations (70), State & Local Trade Associations (103), and Businesses of all sizes (112). Altogether 285 organizations are supportive of the legislation, while only 17 are opposed.”<sup>71</sup>

Powerful lobbying in favor of the Marketplace Fairness Act of 2013 includes advocacy groups such as Retail Industry Leaders Association (RILA) and National Retail Federation (NRF). These advocacy groups encompass major retailers such as Walmart, Best Buy, Home Depot, and Target.<sup>72</sup> NRF President and CEO Matthew Shay believes, “In a 21<sup>st</sup> Century retail industry, we ought to have a 21<sup>st</sup> Century system to ensure uniform collection of sales tax...A modern approach to this issue would provide states

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<sup>70</sup> Ibid.

<sup>71</sup> "Marketplace Fairness Act Compliance." *Marketplace Fairness Act: Supporters*. The Marketplace Fairness Act, n.d. Web. 3 Apr. 2013. <<http://www.marketplacefairness.org/support/>>.

<sup>72</sup> Souppouris, Aaron. "The Verge." *The Verge*. The Verge, 23 Mar. 2013. Web. 26 Mar. 2013. <<http://www.theverge.com/2013/3/23/4138388/us-senate-marketplace-fairness-act-of-2013-symbolic-vote-results-internet-sales-tax>>

with additional revenue in order to protect jobs that are badly needed to support American families and keep our communities economically healthy.”<sup>73</sup> RILA’s executive vice president of public affairs, Katharine Lugar, also commented in support of the bill. She said, “The Marketplace Fairness Act will get government out of the way, restore the free market and close the loophole that has given an unfair advantage to online retailers like Amazon for over a decade.”<sup>74</sup> The ship-to-store platform provider Shopatron also supports The Marketplace Fairness Act. Founder and CEO of Shopatron, Ed Stevens, said “he is pleased to see the Senate taking action to level the playing field for merchants across America.”<sup>75</sup>

On the other hand, the seventeen identified organizations opposed to the Marketplace Fairness Act say it would destroy the court established physical presence standard, “something they assert is a baseline protection shielding taxpayers from harassment by out-of-state collectors.”<sup>76</sup> Opponents believe if the physical presence standard were removed, a slippery slope would result for states to collect income taxes from out-of-state entities.<sup>77</sup> In a letter written to Congress opposing the Marketplace Fairness Act, such organizations also claim that the enactment of this law would put an

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<sup>73</sup> Parry, Tim. "Amazon.com Supports Marketplace Fairness Act." *Multichannel Merchant*. Multichannel Merchant, 9 Nov. 2011. Web. 11 Apr. 2013. <<http://multichannelmerchant.com/multichannelmerchant.com/ecommerce/news/Amazon.com-supports-marketplace-fairness-act-10112011/>>.

<sup>74</sup> Ibid.

<sup>75</sup> Ibid.

<sup>76</sup> Wood, Robert W. "Online Sales Tax Inevitable, Senate Passes Marketplace Fairness Act." *Forbes*. Forbes Magazine, 23 Mar. 2013. Web. 26 Mar. 2013. <<http://www.forbes.com/sites/robertwood/2013/03/23/online-sales-tax-inevitable-senate-passes-marketplace-fairness-act/>>.

<sup>77</sup> Moylan, Andrew. "An Open Letter to the United States Congress: Oppose the Marketplace Fairness Act! Comments Off." *R Street Institute RSS*. N.p., 11 Mar. 2013. Web. 1 Apr. 2013. <<http://www.rstreet.org/policy-brief/an-open-letter-to-the-united-states-congress-oppose-the-marketplace-fairness-act/>>.

undue burden on remote sellers. Since brick-and-mortar sales abide by the physical presence rule, a different standard for remote sellers would force “remote retailers to interrogate their customers about their place of residence, look up the appropriate rules and regulations in thousands of taxing jurisdictions across the country, and then collect and remit sales tax for that distant authority.”<sup>78</sup> Another claim opponents have against this rule is the idea that an unlevel environment between remote retailers and brick-and-mortar would be created that would harm interstate commerce, as remote sellers would have the burden of taxing thousands of different jurisdictions with different standards and different tax holidays. Moreover, opponents also believe the “small seller exemption” does not protect small businesses, considering that the Small Business Administration sets the small seller standard at \$30 million at times.<sup>79</sup>

## **2.6 “Amazon Laws”**

In an effort to combat declining state revenues as a result of the increases in online sales tax purchases that could not otherwise be taxed, New York enacted legislation in 2008 that redefined and expanded physical presence in order to collect online sales tax from remote vendors. This approach presumes that certain individuals and organizations in New York that have a specified relationship with the out-of-state vendors are affiliates of that remote vendor, which constitutes the requisite physical

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<sup>78</sup> Ibid.

<sup>79</sup> Ibid.



presence in the state to then allow the state to require the vendor to collect sales tax.<sup>80</sup>

Since that time, many other states have adopted similar legislation, including the state of Georgia in 2012.<sup>81</sup> Some of these other states include, North Carolina, Rhode Island, Illinois, Arkansas, Connecticut, Vermont, California, and Pennsylvania. There are other states also considering online sales tax legislation.<sup>82</sup> This individual state legislation passed throughout the United States to legalize the collection of online sales tax is commonly referred to as “Amazon laws.” These states have enacted such legislation, as federal laws do not allow states, at this point, to collect remote sales tax beyond the physical presence standard. Because states must continue using the physical presence standard for the collection of sales tax, the spirit of the physical presence ruling was maintained within state “Amazon laws,” but its meaning was expanded for the sake of fairness. Thus, there are key differences between these state laws and the federal legislation, the Marketplace Fairness Act. In this section, I will specifically focus on New York and Georgia’s policies. I selected these two states for specific reasons. I chose New York because it was the first state to enact such legislation, and Georgia because it has similarities to Mississippi’s circumstances.

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<sup>80</sup> Nellen, Annette. "Affiliate Nexus and State Sales Tax." *Affiliate Nexus for Sales Tax (focus on So-called "Amazon" Laws)*. San Jose' State University, n.d. Web. 15 Sept. 2013. <[http://www.cob.sjsu.edu/nellen\\_a/affiliate\\_nexus.html](http://www.cob.sjsu.edu/nellen_a/affiliate_nexus.html)>.

<sup>81</sup> Ibid.

<sup>82</sup> Conley, Larry. "Georgia Approves New Law to Collect Internet Sales Taxes." *American City & County*. N.p., 2 Apr. 2012. Web. 30 Apr. 2013. <<http://americancityandcounty.com/new-laws/georgia-approves-new-law-collect-internet-sales-taxes>>.

## **2.7 New York and Georgia: Attempting to Increase State Revenues**

Both New York and Georgia are different in many ways, but one thing they have in common is a desire to increase their state revenue through the collection of online sales taxes, as seen through each state's implementation of their variation of "Amazon laws" that redefine the physical presence standard. Online shopping, a sub-category of e-commerce, relates to the purchases made between consumers and producers in an online forum.<sup>83</sup> This transaction typically takes place on Amazon.com, one of the largest online retailer corporations, also lending to the name of this type of legislation, "Amazon law." In the last ten years, there has been a steady increase in the number of transactions made online. This increase has thus decreased the percentage of taxed goods throughout the U.S., prior to implementation of some states' "Amazon laws."<sup>84</sup> States like New York understood this steady increase, and anticipated the percentage of online shoppers in their state to grow so much so that a policy was necessary to bring in this would be lost revenue to the state. In 2010, even after the implementation of several states' "Amazon laws," about 137 million US shoppers made online transactions. It is anticipated that in 2016 this number will grow to 175 million online shoppers. According to *Statistica: The Statistics Portal*, "In 2012, U.S. e-commerce sales amounted to 289 billion U.S. dollars, up from 256 billion U.S. dollars in 2011. More than one third of U.S. e-commerce revenue was generated by travel and flight booking websites in 2012. The largest share of online revenue was generated by retail shopping websites however, which earned

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<sup>83</sup> "Online Shopping - Statistics & Facts | Statista." *Statista: The Statistics Portal*. N.p., n.d. Web. 02 Oct. 2013. <<http://www.statista.com/topics/871/online-shopping/>>.

<sup>84</sup> Ibid.

186.2 billion U.S. dollars in 2012. A 2012 e-commerce market forecast projects online retail revenue in the United States reaching 361.9 billion U.S. dollars in 2016.”

In order to stay current and adapt to a changing environment states like New York and Georgia created legislation to collect sales tax from this ever increasing sector of the economy, a tax that each state that has enacted such policy feels rightly belongs to its state. “States pursue(d) affiliate nexus laws to improve collection of sales and use tax. The sales tax nexus standard established by the US Supreme Court is physical presence. A remote (non-present) vendor is not required to collect sales tax. However, customers are required to self-assess and pay use tax. States would prefer to collect the sales tax from thousands of vendors rather than millions of customers. Thus, finding ways to require remote vendors to collect is favored.”<sup>85</sup> Moreover, this shows that it is not politically feasible to monitor customers’ reports of use taxes. In other words the self-monitoring use tax policy is ineffective in proportion to the increasing amount of online shoppers. Overall, sales taxes are the largest source of a state’s own tax revenue (not including money transferred from the federal government). In all, what these statistics and decisions by New York and Georgia’s state legislatures show is a common desire to increase state revenues and overcome hardships brought on by the 2008 recession.

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<sup>85</sup> Nellen, Annette. "Affiliate Nexus and State Sales Tax." *Affiliate Nexus for Sales Tax (focus on So-called "Amazon" Laws)*. San Jose' State University, n.d. Web. 15 Sept. 2013. <[http://www.cob.sjsu.edu/nellen\\_a/affiliate\\_nexus.html](http://www.cob.sjsu.edu/nellen_a/affiliate_nexus.html)>.

## **2.8 New York's Amazon Law**

New York's "Amazon law," TSB-M-08(9)S, the official record name of this change to the New York tax codes, was enacted on April 23, 2008.<sup>86</sup> According to the New York State Department of Taxation and Finance, "The tax law was revised to create a presumption that certain sellers are *vendors* for sales and use tax purposes. Sellers that meet the presumption conditions described below are required to register for sales tax purposes and collect state and local sales taxes."<sup>87</sup> The state of New York presumes one to be a vendor and thus collect sales tax if:

1. "The seller enters into an agreement or agreements with a New York State resident or residents under which, for a commission or other consideration, the resident representative directly or indirectly refers potential customers to the seller, whether by link on an Internet Web site or otherwise. A resident representative would be indirectly referring potential customers to the seller where, for example, the resident representative refers potential customers to its own Web site, or to another party's Web site which then directs the potential customer to the seller's Web site."<sup>88</sup>
2. "The cumulative gross receipts from sales by the seller to customers in New York State as a result of referrals to the seller by all of the seller's resident representatives under the type of contract or agreement described above total

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<sup>86</sup> United States. New York State Department of Taxation and Finance. Office of Tax Policy Analysis. *Summary of the 2008 Sales and Use Tax Budget Legislation*. N.p.: n.p., n.d. *New York State Department of Taxation and Finance*. 28 Aug. 2008. Web. 20 Apr. 2013.

<sup>87</sup> Ibid.

<sup>88</sup> Ibid.

more than \$10,000 during the preceding four quarterly sales tax periods. (Sales tax quarterly periods end on the last day of February, May, August and November.)”<sup>89</sup>

This law was ultimately created to mitigate the loss of revenue New York was experiencing as a result of online purchases. Also, New York enacted this policy to reduce the disadvantage traditional brick-and-mortar companies experience as they are forced to collect and transfer online sales taxes, while online vendors are not, unless they have a physical presence in the state.<sup>90</sup> This law was created within the legislature so as to stay within the physical presence standard currently used to identify who is liable for collecting sales taxes, and to expand what constitutes as physical presence.

## **2.9 Georgia’s Amazon Law**

According to the Associated Press, “A new [2013] law in Georgia requires online retailers to collect sales taxes and remit them to the state.”<sup>91</sup> Like New York’s, this law “has expanded its definition of ‘physical presence’ to require more online stores to collect sales tax from their customers.”<sup>92</sup> This law stipulates that “out-of-state retailers who sell merchandise to Georgia residents through commission- based Internet links are legally

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<sup>89</sup> Ibid.

<sup>90</sup> Ibid.

<sup>91</sup> Conley, Larry. "Georgia Approves New Law to Collect Internet Sales Taxes." *American City & County*. N.p., 2 Apr. 2012. Web. 30 Apr. 2013. <<http://americancityandcounty.com/new-laws/georgia-approves-new-law-collect-internet-sales-taxes>>.

<sup>92</sup> Kass, Arielle. "Changes in Law to Let Georgia Net More Sales Tax from Online Purchases." *The Atlanta Journal- Constitution*. N.p., 8 Oct. 2012. Web. 30 Apr. 2013. <<http://www.ajc.com/news/business/changes-in-law-to-let-georgia-net-more-sales-tax-f/nSXnH/>>.

required to collect state and local sales taxes.”<sup>93</sup> In Georgia’s law, online retailers such as Amazon, must collect sales tax if they attract customers through affiliate, Georgia based websites.<sup>94</sup> For example, “if I’m a retailer in Indiana and I’m attracting customers in Georgia through an ad on a website that is based in Georgia—say a newspaper- that [has now] been interpreted to be a physical presence for practical purposes.”<sup>95</sup> Thus, this law, like New York’s, redefines physical presence, unlike the Marketplace Fairness Act.

Proponents of the Georgia online sales tax law include Georgia Governor Nathan Deal (R) and Rick McAllister, president of the Georgia Retail Association. McAllister says, “E-commerce is the future. We commend Georgia’s leaders for taking this important step to create a level playing field for the state’s retailers.”<sup>96</sup> Fairness is ultimately the reason the Georgia legislature enacted such a policy.<sup>97</sup> Local Georgia business owners agree. Many are tired of their local store being used as a show room for people to inspect merchandise before they purchase it on the Internet.<sup>98</sup> This law took effect October 1, 2012.<sup>99</sup>

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<sup>93</sup> "Online Retailers to Begin Collecting Sales Tax in Georgia." *The Times-Herald*. The Times- Herald, 10 Jan. 2013. Web. 5 May 2013. <<http://www.times-herald.com/local/20130103OnlineSalesTax-MOS>>.

<sup>94</sup> Ibid.

<sup>95</sup> Simms, Claire. "Get Ready for Online Sales Tax." *Georgia Public Broadcasting*. N.p., n.d. Web. 12 May 2013. <<http://www.gpb.org/news/2013/05/06/get-ready-for-online-sales-tax>>.

<sup>96</sup> Ibid.

<sup>97</sup> "More Online Businesses to Collect Sales Taxes." *Georgia.gov*. N.p., 12 Oct. 2012. Web. 15 May 2013. <<http://georgia.gov/blog/2012-10-12/more-online-businesses-collect-sales-taxes>>.

<sup>98</sup> "New Tax Code Requires Online Retailers to Collect Sales Tax." *WSBTv- Atlanta*. N.p., 1 Oct. 2012. Web. 10 May 2013. <<http://www.wsbtv.com/news/news/local/new-tax-code-requires-online-retailers-collect-sal/nSQ9C/>>.

<sup>99</sup> Conley, Larry. "Georgia Approves New Law to Collect Internet Sales Taxes." *American City & County*. N.p., 2 Apr. 2012. Web. 30 Apr. 2013.

According to a report published in January of 2011 by the Special Council on Tax Reform and Fairness for Georgians, Georgia was expected to lose \$410 million from sales tax revenue from online transactions in 2012 alone.<sup>100</sup> “The state expected the new law to generate \$16 million a year, but so far it’s unclear if any retailers that were not collecting tax have started to do so. This discrepancy in the amount of money collected is probably related to the challenge Georgia faces in requiring all online retailers above the threshold to remit the sales tax. Some online retailers, such as Overstock.com, cancelled relationships with Georgia website owners to avoid charging the tax.”<sup>101</sup> Many believe this is the major downfall of this legislation, as it does eliminate jobs in some cases, such as the jobs between Overstock.com and affiliate sites; however, the amount of money brought in from these affiliates is small in comparison to the amount of tax revenue such a policy brings in. This will be addressed in the *Economic Analysis: New York and Georgia State “Amazon Laws”* chapter of this project. Initially, Amazon refused to follow Georgia’s new law. During this point, Governor spokesman Brian Robinson said, “We expect Georgia to be collecting this tax in a reasonable amount of time. The state has the authority to collect the tax. We’re negotiating from this position.”<sup>102</sup> Eventually, Amazon began collecting online sales tax from Georgia on

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<<http://americancityandcounty.com/new-laws/georgia-approves-new-law-collect-internet-sales-taxes>>.

<sup>100</sup> Haines, Errin. "Georgia Passes Internet Sales Tax." *Marietta Daily Journal*. N.p., 31 Mar. 2012. Web. 30 Apr. 2013.

<sup>101</sup> Kass, Arielle. "Georgia, Amazon.com Face off over Sales Tax." *The Atlanta Journal-Constitution*. N.p., 8 Feb. 2013. Web. 30 Apr. 2013.

<<http://www.ajc.com/news/news/georgia-Amazon.com-face-off-over-sales-tax/nWJzW/>>.

<sup>102</sup> Ibid.

September 1, 2013.<sup>103</sup> However, when Amazon initially refused to collect online sales taxes for Georgia, many were calling for the implementation of the Marketplace Fairness Act. Robinson stated, “We believe that more and more states will pass similar laws, as e-commerce becomes a bigger piece of the retail pie. Eventually, it will have to be taken up on the federal level.”<sup>104</sup>

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<sup>103</sup> Kass, Arielle. "Amazon to Start Collecting Sales Tax in Georgia on Sept. 1." *Atlanta Journal- Constitution*. N.p., 9 Aug. 2013. Web. 2 Feb. 2014.  
<<http://www.ajc.com/news/news/breaking-news/amazon-to-start-collecting-sales-tax-in-georgia-on/nZKTf/>>.

<sup>104</sup> Conley, Larry. "Georgia Approves New Law to Collect Internet Sales Taxes." *American City & County*. N.p., 2 Apr. 2012. Web. 30 Apr. 2013.  
<[http://americancityandcounty.com/new-laws/georgia-approves-new-law-collect-internet-sales-taxes](http://americancityandcounty.com/new-laws/georgia-approves-new-law-collect-internet-sales-taxes/)>.



## Chapter Three: Political Analysis: New York and Georgia State “Amazon Laws”

Because New York and Georgia’s online sales tax policy redefines physical presence, as established through the Supreme Court, I thought a political analysis of these state policies would help me reach a policy recommendation for the state of Mississippi. For the purpose of this project, I will perform a political analysis of New York and Georgia’s state Internet sales tax laws. I will do so by first providing background information relevant to the political analysis of both states. Next, I will provide a political analysis for the state of New York by analyzing the problem stream, policy stream, political stream and important actors, and sustainability. I will then do the same for Georgia.

John Kingdon’s book, *Agenda’s, Alternatives, and Public Policies*, establishes a model by which policy moves onto the political agenda. According to the Kingdon model, “[A] policy window is an opportunity for advocates of proposals to push their pet solutions, or to push attention to their special problems.”<sup>105</sup> In Kingdon’s model, he discusses the three necessary streams that must converge in order for the said policy window to open. These three streams consist of a political, problem, and policy stream. The case of state online sales tax laws is no exception to this model, as the necessary streams had to align in order for a policy window to open so that the New York and Georgia state legislatures could make the necessary changes needed to alter the tax code

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<sup>105</sup> John Kingdon, *Agendas, Alternatives, and Public Policies*, Little, Brown, 1984, p.165

in order to potentially allow for the collection of online sales taxes. What spurred the convergence of these three streams to allow a policy window to open was the expiration of the Internet Tax Fairness Act. According to the National Governors Association, “The 1998 Internet Tax Freedom Act, which imposed a moratorium on state or local taxation of Internet access, [was] one exception to longstanding congressional forbearance when it comes to state tax issues.”<sup>106</sup> The Internet Tax Freedom Act was designed with the intention of protecting Internet access from sales taxes in order to let the technology expand. In turn, this law affected states’ ability to tax consumers’ purchases from online vendors; however, this act expired in November of 2007 after several previously instituted extensions. The end of The Internet Tax Freedom Act led to the beginning of a state initiative to collect online sales taxes.

### **3.1 Political Analysis: New York**

#### **3.1.1 Policy Window: Problem Stream**

The expiration of The Internet Tax Freedom Act may have initially opened the window for a change in online sales tax policy in New York, but a problem had to exist as well. In fact, Kingdon states, “There are very few single-factor explanations for high placement on the agenda,” and unless something is high on the agenda it is likely that it will not be voted on. Thus, several problems actually existed that led to a greater opening of the policy window. These problems include changing consumer behavior practices,

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<sup>106</sup> "Testimony - Communications, Taxation, and Federalism." *Testimony - Communications, Taxation, and Federalism*. National Governors Association, 23 May 2007. Web. 01 Dec. 2013. <[http://www.nga.org/cms/home/federal-relations/nga-testimony/page\\_2007/col2-content/main-content-list/may-23-2008-testimony---communic.html](http://www.nga.org/cms/home/federal-relations/nga-testimony/page_2007/col2-content/main-content-list/may-23-2008-testimony---communic.html)>.

declining state revenues, the lack of tax equity and fairness, lack of a federal policy, and an ineffective current system for online sales tax collection. Kingdon states, “Basically, a window opens because of a change in the political stream...or it opens because a new problem captures the attention of governmental officials and those close to them.”<sup>107</sup> In the case of New York’s Internet sales tax law, the new and recurring problems the state faced caused a policy window to open. When coupled together, these problems allowed the policy window to remain open following the expiration of The Internet Tax Freedom Act in 2007.

In 2009 it was reported, “An estimated \$3.4 trillion worth of retail and wholesale transactions, or 17 percent of all U.S. shipments and sales, were conducted over the Internet.”<sup>108</sup> This estimate speaks to the growing changes in consumer behavior practices. On a larger scale, a 2008 Nielsen Global Online Survey on online shopping habits, revealed that “more than 85 percent of the world’s online population has used the Internet to make a purchase—increasing the market for online shopping by 40 percent” between 2006 and 2008.<sup>109</sup> Though this illustrates the changes in consumer practices on a much wider scale than just the state of New York, as our economies become more and more globalized, consumer habits worldwide have the potential to affect even state revenues. Moreover, in a 2008 study investigating how the “de facto tax- free status of most e-retail purchases in the U.S.” affects consumer purchases, the researchers found

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<sup>107</sup> John Kingdon, *Agendas, Alternatives, and Public Policies*, Little, Brown, 1984. P.168.

<sup>108</sup> Tharpe, Wesley. "Bill Analysis: House Bill 386 (LC 34 3484S), Tax Package a Complex Hodgepodge of Reforms." Georgia Budget and Policy Institute, Mar. 2012. Web. 3 Dec. 2013.

<sup>109</sup> "Over 875 Million Consumers Have Shopped Online:The Number of Internet Shoppers Up 40% in Two Years." *Over 875 Million Consumers Have Shopped Online*. The Nielsen Company, 28 Jan. 2008. Web. 05 Dec. 2013.  
<[http://www.nielsen.com/us/en/press-room/2008/over\\_875\\_million\\_consumers.html](http://www.nielsen.com/us/en/press-room/2008/over_875_million_consumers.html)>.

that online sales are higher in states with higher in-state sales taxes. This reveals that the lack of sales tax levied on most Internet retail sites is a primary reason consumers shop online, as opposed to shopping in traditional brick-and-mortar stores that levy a sales tax. These changing consumer preferences establish a problem that online sales tax legislation could help solve in the state of New York. Additionally, the anticipation of how this change in consumer shopping habits might increase also creates a problem that enables policy makers to find a solution.

Anticipation was also a factor of the problem of New York's declining state revenue. In a live televised address in July of 2008, New York Governor David A. Paterson explained the state of New York's fiscal crisis, while acknowledging that the budget deficit was expected to grow to \$26.2 billion by 2011. Governor Paterson said, "This situation will get worse before it gets better."<sup>110</sup> According to an article in *The New York Times*, "In [Governor Paterson's] speech, [he] said taxes collected on 16 of the state's largest banks fell 97 percent between June 2007 and June 2008, to \$5 million from \$173 million."<sup>111</sup> Moreover, SFY 2007- 2008 projections were below what was anticipated, according to the New York State Comptroller's State Fiscal Year 2008-09 Enacted Budget Preliminary Overview.<sup>112</sup> Because New York's state revenue has been in a state of decline, the budget gap created by a lack of online sales tax collection has cost New York a significant amount of money in sales tax revenue that the state can no

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<sup>110</sup> Hansell, Saul. "New York Senate Teases Amazon Customers With Sales Tax Repeal." *New York Times*. New York Times, 30 July 2008. Web. 02 Dec. 2013. <<http://bits.blogs.nytimes.com/2008/07/30/new-york-senate-teases-amazon-customers-with-sales-tax-repeal-bill/>>.

<sup>111</sup> Ibid.

<sup>112</sup> DiNapoli, Thomas P. "State Fiscal Year 2008-09 Enacted Budget Preliminary Overview." State of New York Comptroller. N.p., Apr. 2008. Web. 03 Dec. 2013

longer afford to lose, as this money is necessary “to fund critical public services like education and health care.”<sup>113</sup> Thus, a policy is needed that can close this budget gap and increase state revenues.

Because New York’s brick-and-mortar retailers remit sales taxes to the state, but online vendors without a physical presence in the state do not, a lack of fairness created a problem that helped lead to the passage of an online sales tax policy proposal for the state of New York. According to an editorial article in the New York Times, “Online retailers who do not collect sales tax enjoy a significant and unfair advantage over rivals who must add the tax to their prices.”<sup>114</sup> Thus, “fairness demands sales tax collection by all online retailers—to level the competitive playing field, to ensure that tax law is administered consistently, and to distribute the overall tax burden more progressively.”<sup>115</sup> The *Center on Budget and Policy Priorities* actually states, “Remote sellers get a 5 percent to 10 percent price advantage over ‘Main Street’ businesses when they do not charge sales tax. Given the inherently narrow profit margins in retailing, the loss of sales to remote sellers resulting from the price advantage can make it much harder for some local businesses to survive.”<sup>116</sup> Furthermore, it is unfair that remote retailers who do not collect sales taxes for the state of New York benefit from public services offered in the

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<sup>113</sup> Mazerov, Michael. "New York's "Amazon Law": An Important Tool for Collecting Taxes Owed on Internet Purchases." *Center on Budget and Policy Priorities*. N.p., 23 July 2009. Web. 09 Oct. 2013. <<http://www.cbpp.org/cms/?fa=view>>. ;  
"Yes, You Owe That Tax." *New York Times*. N.p., 26 Nov. 2009. Web. 06 Dec. 2013. <<http://www.nytimes.com/2009/11/27/opinion/27fri1.html>>.

<sup>114</sup> "Yes, You Owe That Tax." *New York Times*. N.p., 26 Nov. 2009. Web. 06 Dec. 2013. <<http://www.nytimes.com/2009/11/27/opinion/27fri1.html>>.

<sup>115</sup> Ibid.

<sup>116</sup> Mazerov, Michael. "New York's "Amazon Law": An Important Tool for Collecting Taxes Owed on Internet Purchases." *Center on Budget and Policy Priorities*. N.p., 23 July 2009. Web. 09 Oct. 2013. <<http://www.cbpp.org/cms/?fa=view>>. ;

state. For example, these online retailers benefit from the roads that allow the purchased goods to be delivered to the online customer. Online customers are willing to make an online transaction with the belief that their purchases are protected, but this consumer protection comes from sales taxes that remote vendors are not required to pay in the state of New York.<sup>117</sup>

Not only will an online sales tax provide a more level playing field for all retailers in the state of New York, but also such a tax would be more progressive, and thus fairer for lower-income New York residents. Typically, more affluent consumers are able to make online purchases leaving those less privileged to take on an unfair burden of traditional sales taxes. According to the *New York Times*, the Pew Internet and American Life Project found that, “low- income Americans—those making less than \$25,000 a year—are less likely to shop online than higher- income people.”<sup>118</sup> Therefore, if an online sales tax policy was implemented in New York, then not only would brick-and-mortar retailers be treated more fairly, but also lower-income New York tax paying citizens would be treated more fairly as well.

The lack of a comprehensive federal policy similar to the Marketplace Fairness Act and inefficacy of New York’s current policy also drives the problem stream. The lack of a comprehensive federal policy forces New York policy makers to design a state policy in order to collect online sales tax to close the budget gap created by a lack of online sales tax revenue. In fact, an article in *The Times- Tribune* states, “The failure of

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<sup>117</sup> Ibid.

<sup>118</sup> "Yes, You Owe That Tax." *New York Times*. N.p., 26 Nov. 2009. Web. 06 Dec. 2013. <<http://www.nytimes.com/2009/11/27/opinion/27fri1.html>>.

Congress to mandate payment of state sales taxes for online sales is [an example of] public policy that helps to diminish local commerce and investment.”<sup>119</sup>

According to the *Center on Budget and Policy Priorities*, “Though states lack the legal authority to require sellers who do not have a physical presence in the state to charge sales tax, every state requires purchasers to remit the tax directly to their state department of revenue” as a use tax, instead of a sales tax.<sup>120</sup> In New York, this requirement was established in 2003 when the state created a new line on income tax forms with the intent of collecting taxes on out-of-state purchases. In 2007 before this law was implemented, \$45.2 million in taxes were collected as a result of this tax collection method. New York is aware that few consumers actually file this information on their tax form, but monitoring this system is inefficient and nearly impossible. Therefore, another problem is created that adds to what Kingdon describes as the problem stream.

### 3.1.2 Policy Window: *Policy Stream*

Annette Nellen of San Antonio State University states, “Under federal law, out-of-state retailers are not required to collect taxes on [online] purchases unless they have a physical presence in the state. In practice, this means that a Best Buy or Target is required to collect taxes from online purchases, [since Best Buy and Target have

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<sup>119</sup> "Christmas Gift for States, Merchants Court Eases Way for States to Collect Internet Sales Tax." *The Times-Tribune*. N.p., 5 Dec. 2013. Web. 07 Dec. 2013. <<http://thetimes-tribune.com/opinion/christmas-gift-for-states-merchants-court-eases-way-for-states-to-collect-internet-sales-tax-1.1595846>>.

<sup>120</sup> Mazerov, Michael. "New York's "Amazon Law": An Important Tool for Collecting Taxes Owed on Internet Purchases." *Center on Budget and Policy Priorities*. N.p., 23 July 2009. Web. 09 Oct. 2013. <<http://www.cbpp.org/cms/?fa=view>>.

traditional retailing locations in most states] whereas an Amazon or eBay [are] not” required to collect sales tax in most states.<sup>121</sup> Also, states do not have the authority to create policy like the Marketplace Fairness Act, which is receiver sourcing, because states are still bound by the physical presence standard and only Congress can change this standard. Therefore, it is necessary for New York to redefine physical presence, the standard that determines which businesses are required to collect sales tax, in order to increase sales tax collection from online vendors.

Because the *Quill Corp* ruling in 1992 was less concrete, New York was given the opportunity to redefine physical presence and expand nexus, the link between the two states that could legally enable another state to collect sales tax from a remote online vendor. Thus, with the opportunity to expand the definition of physical presence and the end of the Internet Tax Free Act, New York was able to create a policy that would enable the state to collect online sales taxes from remote online vendors. New York’s Internet Sales Tax policy, also known as New York’s “Amazon Law” is not a completely new idea. Instead, it is a revitalized idea since some states have attempted to collect remote sales tax since 1967. Although the idea of collecting remote sales taxes is not new, the provisions of this “Amazon Law” are new in expanding the definition of physical presence. This policy accomplishes three main goals, and works to correct or conform to the problems of changing consumer behavior practices, declining state revenues, the lack of tax equity and fairness, lack of a federal policy, and an ineffective current system for online sales tax collection. These three potential accomplishments include: mitigating the loss of state revenue, reducing “the competitive disadvantage faced by local merchants

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<sup>121</sup>Nellen, Annette. "Affiliate Nexus and State Sales Tax." San Jose State University, n.d. Web. 13 Apr. 2013. <[http://www.cob.sjsu.edu/nellen\\_a/affiliate\\_nexus.html](http://www.cob.sjsu.edu/nellen_a/affiliate_nexus.html)>.



and those Internet sellers...that do collect sales taxes, and [reducing] the disproportionate impact of sales taxes on low-income persons arising from their frequent inability to buy online and thus avoid the taxes.”<sup>122</sup> The Institute of Local Self Reliance describes how this policy would work.

[New York’s] measure states that any online retailer that generates more than \$10,000 in sales via in-state sales affiliates must collect New York sales tax. Many online retailers, including Amazon and Buy.com, have sales affiliates nationwide that link to the retailer’s web site and are paid commission on any sales generated from their referrals. New York’s measure clarifies state tax law to say that sales affiliates based in the state are representatives of the online retailer. This means that the retailer has nexus (i.e. physical presence) in the state and is required to collect state sales taxes.<sup>123</sup>

### 3.1.3 Policy Window: *Political Stream* and Important Actors

In Kingdon’s *Agenda’s, Alternatives, and Public Policies*, the author describes how “sometimes [a policy] window is opened by a problem that presses in on government, or at least comes to be regarded as pressing.” What’s more, “If decision makers become convinced a problem is pressing, they reach into the policy stream for an alternative that can reasonably be seen as a solution.”<sup>124</sup> This is the case for New York’s Internet Sales Tax law. The problems caused policy makers to act; policy makers did not seek to find a problem in order to claim a solution for political gains. In this case, the policy implementation effort was bipartisan. Conservatives can view and defend this policy because it is not a “new” tax, but rather a more efficient means of collecting a tax

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<sup>122</sup> Mazerov, Michael. "New York's "Amazon Law": An Important Tool for Collecting Taxes Owed on Internet Purchases." *Center on Budget and Policy Priorities*. N.p., 23 July 2009. Web. 09 Oct. 2013. <<http://www.cbpp.org/cms/?fa=view>>.

<sup>123</sup> “Internet Sales Tax- Fairness." *Institute for Local Self-Reliance*. N.p., 2 Dec. 2008. Web. 6 Dec. 2013. <<http://www.ilsr.org/rule/internet-sales-tax-fairness/2237-2/>>.

<sup>124</sup> John Kingdon, *Agendas, Alternatives, and Public Policies*, Little, Brown, 1984.

previously due on individual income forms. Also conservatives likely support a policy that enables states to have more power, especially power over its tax system. Liberals also can agree with this policy as it increases state revenue and takes away the undue burden lower-income families pay on taxes because more affluent families can afford to shop online.

Public opinion is important to any policy, even if the public is highly inattentive. The general public did not appear to be as in tune with this policy as specific groups with business concerns. Not surprisingly, local business owners tend to support this policy. Music storeowner Peter Sides is one such supporter. Sides, whose businesses in Pennsylvania and New York employ around 100 people, believes “there’s no reason to oppose the congressional legislation, unless you want to let online retailers maintain their competitive sales tax advantage over brick-and-mortar stores.” Interest groups have also heavily played a role in this policy. There are strong supporters both for and against this policy. Ted Potrikis, Vice President of the Retail Council of New York state supports this tax policy on the grounds of fairness. The Retail Council of New York represents over 2000 vendors, including but not limited to Macy’s, Wal-Mart, Target, Home Depot, and even mom-and-pop shops.<sup>125</sup> Mom-and-pop shop owners teaming up with retail giants like Wal-Mart sends a pretty clear message on this issue of fairness. Barnes & Noble also supports this policy. In a letter written to Governor Paterson on behalf of Barnes & Noble, the company attorney asked Governor Paterson to please support this

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<sup>125</sup> Tumulty, Brian. "NY Retailers Could Gain from Internet Sales Tax Legislation." *Wgrz.com*. N.p., 25 Apr. 2013. Web. 30 Apr. 2013.  
<<http://www.wgrz.com/news/article/212029/13/NY-Retailers-Could-Gain-from-Internet-Sales-Tax-Legislation->>.

legislation on the grounds of fairness.<sup>126</sup> These strong supporters and the bipartisan support for the policy show that this policy had a strong potential to pass.

As with most policies however, there are also strong interest groups in opposition. One such group is the state Business Council. The Business Council is against this policy because it supports cutting spending, as opposed to increasing New York's revenue through taxes.<sup>127</sup> Other groups initially against this policy include Amazon.com and Overstock.com. These retail giants believe that this policy is unconstitutional, and instead support a comprehensive federal online sales tax policy. "We believe the law is unconstitutional and won't stand the test of the courts... said Jonathan Johnson, Overstock's senior vice president for corporate affairs. 'We can't afford to have our New York affiliates up online if it subjects us to New York sales taxes.'"<sup>128</sup> However, these retail giants did not scare New York legislatures, as these businesses threats seemed more aimed toward national legislatures to create a national policy, as opposed to individual state legislatures. Coalition leaders of this policy include Governor Paterson, who supports the policy due to fiscal concerns for the state of New York. Senate majority leader Joseph Bruno and Speaker of the House Sheldon Silver also support this policy.<sup>129</sup> Paterson and Silver are both members of the Democratic party, while Bruno is a

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<sup>126</sup> New York Senate Bill 6807-C (Bill Jacket)

<sup>127</sup> Sachoff, Mike. "NY Lawmakers Approve Internet Tax." *WebProNews*. N.p., 14 Apr. 2013. Web. 6 Dec. 2013. <<http://www.webpronews.com/ny-lawmakers-approve-internet-tax-2008-04>>.

<sup>128</sup> Hansell, Saul. "Overstock.com Throws New York Affiliates Overboard to Avoid Sales Tax." *New York Times*. N.p., 14 May 2008. Web. 12 Dec. 2013. <[http://bits.blogs.nytimes.com/2008/05/14/overstockcom-throws-new-york-affiliates-overboard-to-avoid-sales-tax/?\\_r=0](http://bits.blogs.nytimes.com/2008/05/14/overstockcom-throws-new-york-affiliates-overboard-to-avoid-sales-tax/?_r=0)>.

<sup>129</sup> Hansell, Saul. "New York Senate Teases Amazon Customers With Sales Tax Repeal." *New York Times*, 30 July 2008. Web. 2 Dec. 2013. <<http://bits.blogs.nytimes.com/2008/07/30/new-york-senate-teases-amazon-customers-with-sales-tax-repeal-bill/>>.

Republican. These policy leaders' political ties further illustrate the bipartisan nature of this legislation. In all, with bipartisan coalition leaders, strong local interest group support, and opposition aimed at federal legislatures and not state legislatures, this policy was initially in a place where passage was not only possible, but also likely.

#### 3.1.4 Sustainability

Two important factors cannot occur in order for New York's Internet sales tax policy to be sustainable. First, if New York's law was struck down in a court of law, the policy would, by default, no longer be sustainable. In actuality, New York's "Amazon law" already has withstood the test of courts. The New York online sales tax policy lawsuit began when Amazon brought suit to the law in court. Overstock.com, a smaller retailer than Amazon, also brought suit. Overstock.com however, "terminated its relationships with its approximate 3,400 New York affiliate advertisers."<sup>130</sup> By dissolving their relationships with these 3,400 affiliates, Overstock.com does not collect and remit sales tax to the state of New York.

Amazon and Overstock.com both sued on the same grounds, that New York's "Amazon Law" violated the commerce clause, as they believe affiliate programs do not constitute a physical presence in the state. Amazon and Overstock.com also believe the new tax law "create[s] an irrational, irrefutable presumption [that] a seller was soliciting business in New York state, thus violating the due process clause."<sup>131</sup> The first trial court

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<sup>130</sup> Nellen, Annette. *Affiliate Nexus and State Sales Tax*. San Jose' State University, 27 Apr. 2013. Web. 28 Apr. 2013. <[http://www.cob.sjsu.edu/nellen\\_a/affiliate\\_nexus.html](http://www.cob.sjsu.edu/nellen_a/affiliate_nexus.html)>.

<sup>131</sup> Cave, Bryan. "Constitutionality of New York's "Amazon.com" Law Is Upheld." *Bryan Cave: A Broader Perspective*. N.p., 1 Apr. 2013. Web. 20 Apr. 2013. <<http://www.bryancave.com/files/Publication/29c12557-0b97-4d4a-a3f4-06647d46302e/Presentation/PublicationAttachment/f1ea8230-611a-4eb5-a0ce-417ef9acc05f/Tax%20Bulletin%204-1-13.pdf>>.

deemed New York's tax law to be constitutional in 2009.<sup>132</sup> Amazon and Overstock.com appealed. On March 28, 2013 New York State's highest court, the Court of Appeals, affirmed the lower court's decision. In its ruling, the New York Court of Appeals said the tax law is constitutional as it does not place an undue burden on interstate commerce. Moreover, "the court also noted: 'The world has changed dramatically in the last two decades, and it may be that the physical presence test is outdated. An entity may now have a profound impact upon a foreign jurisdiction solely through its virtual projection via the Internet.'"<sup>133</sup> Following this ruling, The United States Supreme Court refused to hear Amazon's and Overstock.com's case over online sales tax collection in December of 2013, after Amazon and Overstock.com tried to appeal the New York Court of Appeal's decision.<sup>134</sup>

A second factor that cannot occur in order for New York's policy to be an active, working policy is the passage of a federal policy. If other states begin implementing this policy Amazon and other retail giants would likely put even greater pressure on federal legislatures to pass a comprehensive federal policy to make sales tax collection more simple and consistent. If a federal policy was implemented, it is likely that New York would utilize the effects of the federal policy and withdraw this state policy because it would create a much stronger working relationship with Internet retailers. If this

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<sup>132</sup> Mazerov, Michael. "Center on Budget and Policy Priorities." *Center on Budget and Policy Priorities*. N.p., 23 July 2009. Web. 28 Apr. 2013.

<<http://www.cbpp.org/cms/?fa=view>>.

<sup>133</sup> "Internet Sales Tax Fairness- New York." *Institute for Local Self- Reliance*. N.p., 2 Dec. 2008. Web. 15 Apr. 2013. <<http://www.ilsr.org/rule/internet-sales-tax-fairness/>>.

<sup>134</sup> Wolf, Richard. "Supreme Court Won't Rule on State Internet Sales Taxes." *USA Today*. N.p., 03 Dec. 2013. Web. 02 Apr. 2014.

<<http://www.usatoday.com/story/news/nation/2013/12/02/supreme-court-amazon-internet-sales-tax/3805279/>>.

happens, some may view the New York's measure as unsustainable, but I believe quite the opposite. As other states implement similar "Amazon laws," and Amazon continues to put pressure on Congress to pass a federal policy, then it seems that while this New York state policy itself was not sustainable, its overarching goal, to collect online sales taxes in order to increase state revenues and create a fairer marketplace, is lasting.

In Patashnik's *Reforms at Risk*, the author describes what sustainability means. To Patashnik, sustainability does not mean the policy doesn't change, but that its principles remain in tact.<sup>135</sup> Therefore, a federal policy would likely put an end to this measure, but the principle that New York was trying to establish would be maintained, not only for New York, but also for every state in the U.S. It is possible that this policy is a change agent that could begin the process of creating a fairer marketplace and increasing state revenues on a much larger scale even if the state policy itself is no longer in use.

In fact, New York's policy could be compared to the creation of the sales tax. In 1930, Mississippi was the first state to implement a sales tax. The sales tax was created during the Great Depression, likely because Mississippi faced a similar problem states are facing today, which is declining state revenues. Many states quickly followed Mississippi's lead, understanding the implications such a tax could have on increasing state revenue. Today, forty-five states and the District of Columbia impose a sales tax.<sup>136</sup> The success and sustainability of the sales tax policy could speak to the sustainability of New York's online sales tax law. It can be said that once a policy is in place and

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<sup>135</sup> Patashnik, *Reforms at Risk* (Princeton 2008)

<sup>136</sup> Fox, William F. "History and Economic Impact." University of Tennessee, 13 Mar. 2002. Web. 4 Nov. 2013. <<http://bus.utk.edu/cber/staff/mnmecon338/foxipt.pdf>>.

consumers are accustomed to its implications, then backlash over the policy eventually diminishes, as it did for general sales tax laws. Therefore, if New York's policy continues to last for a few years, then it is even more likely to remain sustainable, unless a federal policy is passed in its place that would essentially maintain the collection of online sales taxes, but without redefining physical presence.

### **3.2 Political Analysis: Georgia**

#### **3.2.1 Policy Window: *Problem Stream***

The problems that existed in Georgia and to a degree continue to exist are the same problems that existed in New York in 2008. These problems include changing consumer behavior practices, declining state revenues, the lack of tax equity and fairness, lack of a federal policy, and an ineffective current system for online sales tax collection. In terms of changing consumer practices even after the implementation of New York's so-called Amazon law, consumer practices continued to change. Research shows that online shopping is growing at a much faster pace than traditional retail companies. In 2012, online shopping actually grew by fifteen percent nationally. Although this research depicts growth on a national scale, these statistics reveal the continued changes in shopping preferences for consumers, including consumers in the state of Georgia, even after New York's measure was implemented. Moreover, Georgia was also facing a budget shortfall like New York in 2008. Before passage of Georgia's Internet sales tax bill, The *Center on Budget and Policy Priorities* anticipated that Georgia would have a

\$300 million budget gap in 2013.<sup>137</sup> Fairness in the marketplace was also a key concern Georgia faced without the implementation of a policy that allows for the collection of online sales taxes. The ultimate argument in which Georgia relied and continues to rely on is the fact that “brick-and mortar retailers in Georgia are being placed at a 6 percent or 7 percent disadvantage in the middle of a recession.”<sup>138</sup> Lower-income Georgia families were also in an unfair position without this policy. In addition, online companies that do not pay any sales tax to the state of Georgia also can unfairly utilize public services Georgia provides.

Also like New York, lack of a federal policy and an ineffective current state policy generated a problem that an Internet sales tax policy could potentially solve. Technically before implementation, Georgians who shopped online were required to file the owed tax on their income tax forms, but few people actually abided by this law.<sup>139</sup> In all, these problems contributed to the problem stream, which converged with the political and policy stream in order to allow a policy window to open.<sup>140</sup>

### 3.2.2 Policy Window: *Policy Stream*

Like New York’s Amazon law, Georgia’s potential Internet sales tax policy

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<sup>137</sup> Olliff, Phil, Chris Mai, and Vincent Palacios. "States Continue to Feel Recession Impacts." *Center on Budget and Policy Priorities*. N.p., 27 June 2012. Web. 2 Dec. 2013. <<http://www.cbpp.org/cms/?fa=view>>.

<sup>138</sup> Galloway, J. "Georgia’s Effort to Collect Taxes Due on Internet Sales." *Atlanta-Journal Constitution*. N.p., 13 Feb. 2012. Web. 2 Dec. 2013. <<http://blogs.ajc.com/political-insider-jim-galloway/2012/02/13/at-the-capitol-amazon-com-versus-the-world/>>.

<sup>139</sup> Salzer, James. "Georgians Torn over Tax on Internet Sales." *Atlanta- Journal Constitution*. N.p., 4 Apr. 2012. Web. 2 Dec. 2013. <<http://www.ajc.com/news/news/state-regional-govt-politics/georgians-torn-over-tax-on-internet-sales/nQSmM/>>.

<sup>140</sup> John Kingdon, *Agendas, Alternatives, and Public Policies*, Little, Brown, 1984.



redefines physical presence, a necessary condition for the legal collection of remote sales taxes. Georgia's online sales tax policy "create[s] nexus for purposes of sales tax to vendors that do not currently have nexus if they have affiliate relationships with in state sellers, provided that relationship has cumulative gross receipts from sales by the affiliate to customers in Georgia in excess of \$10,000 over the last twelve months."<sup>141</sup> Like New York, Georgia's "state legislature [has] expanded [its] definition of 'physical presence' to include online retailers that have marketing or advertising affiliates in their states. By this standard, a retailer such as Amazon, which says it has a physical presence in only a few states, suddenly has a physical presence almost everywhere."<sup>142</sup> Georgia is the tenth state to enact an online sales tax policy, and all previously instituted policies' structures are very similar to that of New York's policy.<sup>143</sup> Thus, at the point of implementation in the online sales tax battle, Georgia was not creating a new policy or attempting to implement a new idea, nine other states had enacted almost identical policies with the goal of taxing affiliate programs in order to increase state revenue and create a fairer marketplace.

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<sup>141</sup> Hinton, Russell W. "Fiscal Note House Bill 386 Substitute (LC 34 3477S)." *Department of Audits and Accounts*. 19 March 2012.

<sup>142</sup> Salzer, James. "Georgians Torn over Tax on Internet Sales." *Atlanta- Journal Constitution*. N.p., 4 Apr. 2012. Web. 2 Dec. 2013. <<http://www.ajc.com/news/news/state-regional-govt-politics/georgians-torn-over-tax-on-internet-sales/nQSmM/>>.

<sup>143</sup> "Online Sales Tax Goes Live in Georgia." *Examiner.com*. N.p., 8 Oct. 2012. Web. 3 Dec. 2013. <<http://www.examiner.com/article/online-sales-tax-goes-live-georgia>>.

### 3.2.3 Policy Window: *Political Stream* and Important Actors

In *The Logic of Congressional Action* Arnold states, “Coalition leaders do not live in a dichotomous world. They do not choose among paired alternatives; they define those alternatives... They shape policy proposals by modifying old remedies, inventing new ones, and combining bits and pieces from here and there.”<sup>144</sup> The idea that coalition leaders define policy and its alternatives correctly defines the actions of Georgia Governor Nathan Deal. Deal, despite a visit from Grover Norquist about the importance of Republicans all agreeing to not increase taxes, fought for implementation of a Georgia “Amazon Law.” Deal, coupled with bill sponsor Representative Matt Ramsey (R-Peachtree City), act as coalition leaders in attempting to get Georgia’s online sales tax legislation passed.<sup>145</sup> Moreover, the bipartisan nature of Georgia’s online sales tax bill is reflected, just as New York’s policy was bipartisan. Because Governor Deal is a Republican and an avid coalition leader of this policy and New York’s Governor Paterson is a Democrat, the bipartisanship of Georgia’s policy is exemplified. The bipartisan nature of this bill likely played a significant roll in the bill’s ability to pass.

Interest groups play and will continue to play an avid role in the creation and potential for this Georgia legislation. For one, The Georgia Retail Association is an avid supporter of the policy in the name of fairness. The association represents a wide range of retailers, but with the common interest of gaining fairness in the marketplace for brick-

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<sup>144</sup> Arnold, R. Douglas. *The Logic of Congressional Action*. New Haven: Yale UP, 1990. Print.

<sup>145</sup> Galloway, J. "Georgia's Effort to Collect Taxes Due on Internet Sales." *Atlanta-Journal Constitution*. N.p., 13 Feb. 2012. Web. 2 Dec. 2013.  
<<http://blogs.ajc.com/political-insider-jim-galloway/2012/02/13/at-the-capitol-amazon-com-versus-the-world/>>.

and-mortar retailers. Of the large and small retailers supporting this legislation, Home Depot carries the most clout. Home Depot was built in Georgia and is the “second largest retailer in the nation and the supplier of thousands of jobs in the state.”<sup>146</sup> Small business owners also make up a strong area of support for this policy. Small business owners “want shoppers to think twice before walking into their stores, finding what they want and then going to the Internet and saving 8% sales tax on their purchases.”<sup>147</sup> Other small business owners like Bob Khoury, owner of Atlanta’s Showcase Photo and Video accounts for the same issue, and believes the reason people come to his store then purchase the products online is a result of the price difference caused by a lack of sales tax on online items.<sup>148</sup> As with New York’s policy, there are also opponents, namely Amazon. Similarly, the National Conference of State Legislatures also opposes this state-level legislation, and believes that a federal policy should instead be instated.

### 3.2.4 Sustainability

Similar to New York’s policy, two important factors cannot occur in order to maintain the sustainability of this policy. These two factors still include the passage of a federal policy enabling states to collect online sales tax and the potential for courts to strike down Georgia’s policy. If either of these factors were to occur, then the policy would not be able to withstand the test of time. Fortunately for Georgia, this policy has a bright future in terms of sustainability because one factor that could bring an end to the

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<sup>146</sup> Ibid.

<sup>147</sup> Liss, Bill. "Georgia Shoppers Now Have to Pay Sales Tax Online." *NBC: 11 Alive Atlanta*. N.p., 19 Nov. 2012. Web. 2 Dec. 2013.  
<<http://www.11alive.com/news/article/259244/40/Georgias-internet-shoppers-now-have-to-pay-sales-tax>>.

<sup>148</sup> Salzer, James. "Georgians Torn over Tax on Internet Sales." *Atlanta- Journal Constitution*. N.p., 4 Ap. 2012. Web. r2 Dec. 2013.  
<<http://www.ajc.com/news/news/state-regional-govt-politics/georgians-torn-over-tax-on-internet-sales/nQSmM/>>.

policy can likely be eliminated. In other words, a court striking down Georgia's policy, though possible, is unlikely. This can be determined because New York's online sales tax policy was upheld in court in 2009 after Amazon sued the state. In this case, the Supreme Court of New York ruled that New York's policy was constitutional and that Amazon was trying to avoid paying taxes.<sup>149</sup> With this knowledge, Georgia can have confidence that its online sales tax policy will be sustainable, unless a federal policy is instituted. However, even if a federal policy is instituted, the principle Georgia was trying to establish through this policy would be maintained, and thus the policy would not be a total loss. Moreover, as this policy stands the tests of time the more the general public will be accustomed to paying the tax, and the less likely citizens will be to argue against payment. Georgia's policy is also similar to the implementation of the sales tax by Mississippi.

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<sup>149</sup> Burrows, Justin. "'Amazon Tax' Unconstitutional and Unwise." *Tax Foundation*. N.p., 15 Sept. 2009. Web. 2 Dec. 2013. <<http://taxfoundation.org/article/amazon-tax-unconstitutional-and-unwise>>.

## **Chapter Four: Economic Analysis: New York and Georgia State “Amazon Laws”**

For this economic analysis, I will discuss potential economic impacts for New York’s and Georgia’s Internet sales tax policies simultaneously. Also, I am treating both policies as though neither has yet been implemented. I am treating these policies as though they have yet to be implemented due the limited availability of economic information for each state on the results of their policies. Also, I believe addressing these considerations is an important factor in considering my recommendation for the state of Mississippi. One way in which my research for this project was limited was my ability to access economic information from New York and Georgia. More specifically, I could not access information regarding how much money either state has collected in total since the creation of each states’ prospective online sales tax policy. Even with limited access to economic information for both of these states’ online sales tax policies, I believe this economic analysis reveals that the amount of money each state might lose as a result of an online sales tax policy implementation is very small in comparison to the amount of revenue such a policy could bring to each prospective state.

### **4.1 Economic Analysis: Based on Fairness**

One of the critical reasons for implementing these policies was on the basis of creating a fairer marketplace. One possible economic analysis that could be used to see

the economic benefits of a fairer marketplace is to compare how much businesses in direct competition with online sales companies generate in sales tax revenue. This comparison should be performed twice. The first time is should be performed as if neither Georgia nor New York has implemented its online sales tax policy. The second time, the comparison should show what each state anticipates online companies will be bringing in, in regards to sales tax and compare that to the original number traditional retailers were already bringing in for the state. This analysis could even be performed on specific sales items and not just general businesses in competition. For example, Barnes & Noble is in direct competition with Amazon in New York. Barnes & Noble predominantly sells books and related items. “In all, [Barnes and Noble] and its affiliates paid more than \$37 million in sales and use taxes to New York City and New York State.”<sup>150</sup> This number could be compared to how much Amazon is remitting in sales taxes on books and other related items, and then a second comparison could be done for how much Amazon is anticipated to bring into the state of New York on such items. If, as a percentage of sales, the tax revenue is more even between the two companies used in the comparison of what each state anticipates the tax will bring in, whether generally or on specific items, then the policy does in fact create a fairer marketplace for business transactions. Also, if the amount of sales tax revenue is greatly increased as a result of the implementation of each state’s policy, as compared to what the online retailer was bringing in before policy implementation, it seems likely that the economic analysis will illustrate the need for Internet sales tax policy implementation.

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<sup>150</sup> New York Senate Bill 6807-C (Bill Jacket)

## **4.2 Cost-Benefit Analysis (Affiliates)**

A cost-benefit analysis for this policy would be most effective if considering the potential loss of affiliate relationships as a cost and previously uncollected tax revenue as a benefit if the policy were implemented. To perform this cost-benefit analysis, I would first determine for each state how much online sales companies are bringing in, in sales tax revenue prior to possible implementation of the law. Next, I will determine how much affiliates make in each state and add the amount of income of each affiliate together. For example, in Georgia there are an estimated 6000 affiliates. Most affiliates make \$20 to \$100 per month; however, some do make more than this average.<sup>151</sup> Using this average, it can be determined that affiliates bring in between around \$120,000 to \$600,000 in income each year in Georgia. Each of these policies has the potential to create a divide between online companies and their standard marketing tools, the use of affiliates. Therefore, it is possible that online companies would cut relations with affiliates. Because this is a possibility, I would determine the potential loss in income affiliates would have if relationships were terminated. I would then compare this number to how much each online company is expected to bring in through sales tax revenue. If the loss of affiliate income is greater or very close to the amount each company is anticipated to remit in sales taxes, then the costs outweigh the benefits. If each company brings in significantly more than affiliates in sales tax revenue, then the benefits outweigh the costs and the policy should be implemented. Realistically, it can be said that the

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<sup>151</sup> Salzer, James. "Georgians Torn over Tax on Internet Sales." *Atlanta- Journal Constitution*. N.p., 4 Ap. 2012. Web. r2 Dec. 2013. <<http://www.ajc.com/news/news/state-regional-govt-politics/georgians-torn-over-tax-on-internet-sales/nQSmM/>>.

benefits would far outweigh the costs of implementing a state “Amazon law,” as the state laws should bring in millions of dollars, and the loss of affiliates is worth much less.

### **4.3 Economic Impact Analysis**

Each state should also perform an economic impact analysis prior to implementation of their prospective Internet sales tax policies. It is possible that there could be benefits that are not directly monetary benefits, but could benefit New York or Georgia if either state policy passes. The question to be asked in this economic impact analysis should be whether or not there will be benefits to traditional retailers other than a more level playing field in the marketplace? If online shopping is taxed in either New York or Georgia, it is possible that more citizens in either state that passes its policy will shop at local retailers because online competitors no longer have a price advantage. If this is the case, local vendors could potentially hire more workers, and thus create jobs. If sales tax revenue is greatly increased and local businesses create jobs and hire more workers through policy implementation, then the policy that meets this criteria in either state and should be implemented on economic grounds.



## **Chapter Five: “Amazon Laws,” The Marketplace Fairness Act, and Alternatives**

In this chapter, I will identify the policy attributes that affect potential preferences of citizens for New York, Georgia, and the Marketplace Fairness Act. I will also briefly identify alternative solutions to the Marketplace Fairness Act, which are in the development stages.

### **5.1 Policy Attributes that Affect Potential Preferences: New York**

Though the general public did not seem particularly decided one way or the other on New York’s policy, there are ways policymakers can predict public opinion. These factors include who pays the costs for a policy, who reaps the benefits, and the magnitude with which this policy will have an affect on the public. In terms of costs, over thirty online companies will remit sales tax to New York State upon the passage of this legislation. The Institute for Local Self-Reliance notes, “According to the New York State Department of Taxation and Finance, in the first six months since the provision became law, the state has recouped \$46 million.”<sup>152</sup> In March of 2013, The New York State Department of Taxation and Finance said that “online only retailers collected and

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<sup>152</sup> "Internet Sales Tax Fairness- New York." *Institute for Local Self- Reliance*. N.p., 2 Dec. 2008. Web. 15 Apr. 2013. <<http://www.ilsr.org/rule/internet-sales-tax-fairness/>>.

remitted \$500 million in sales tax on more than \$6 billion in transactions.”<sup>153</sup> From this fiscal year alone, “the state collected \$150 million from the tax in the fiscal year that ended March 31 [2013], according to the State Department of Taxation and Finance.”<sup>154</sup>

Online consumers will pay the costs. Recall that online consumers are typically affluent citizens. The benefits will be much more general, as they are just added to the overall state revenue. Typically, policies with benefits that are not easily identifiable are usually not popular with the public. New York’s policy is slightly different from the norm, however, even with the general benefits because technically the state’s online sales tax is not new. Although most consumers do not accurately complete their income tax form, it is likely that larger, more expensive purchases bought online are included on the form more often than less expensive items. For example, New York residents likely remember and list purchasing a car on their income form before recalling purchasing a \$10 book on the Internet. Thus, the magnitude of New York’s policy is potentially not very large for the individual consumer. Moreover, it is likely that the “new” costs the consumers are experiencing are not individually that expensive. Combining the taxes of these smaller purchases though, has the potential to generate large benefits for New York, since these items were likely overlooked previously on income tax forms. Because of this, it would have been easier for policymakers who understand the importance of closing the budget gap and creating a fairer marketplace to manipulate the public’s

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<sup>153</sup> "New York Court Upholds 'Amazon.com' Tax." *Chicago Tribune*. Reuters, 28 Mar. 2013. Web. 20 Apr. 2013. <[http://articles.chicagotribune.com/2013-03-28/business/chicago-new-york-court-upholds-Amazon-com-tax-20130328\\_1\\_sales-tax-richard-pomp-other-out-of-state-online-retailers](http://articles.chicagotribune.com/2013-03-28/business/chicago-new-york-court-upholds-Amazon-com-tax-20130328_1_sales-tax-richard-pomp-other-out-of-state-online-retailers)>.

<sup>154</sup> Tumulty, Brian. "NY Retailers Could Gain from Internet Sales Tax Legislation." *Wgrz.com*. WGRZ- NBC, 25 Apr. 2013. Web. 30 Apr. 2013. <<http://www.wgrz.com/news/article/212029/13/NY-Retailers-Could-Gain-from-Internet-Sales-Tax-Legislation->>.

opinion of this policy. In addition, policymakers could also identify possible alternatives to this policy such as instituting a new tax or increasing tax rates. With stronger public support, New York's measure was more likely to pass at the state level. Being a single-stage policy also gave this policy an additional edge that lent to the passage of the bill.<sup>155</sup>

In chapter eight of R. Douglas Arnold's "The Logic of Congressional Action," Arnold describes manipulating tax policies. When describing the development of the income tax, Arnold states, "New taxes are usually created in times of crisis, and the income tax was no exception. Crises increase the need for governmental revenue, make citizens more tolerant of new taxes, and encourage politicians to take greater than usual risks."<sup>156</sup> Though New York's Internet sales tax policy is on a much smaller scale than the development of the income tax, the logic remains the same. Because New York was facing financial difficulties and a budget crisis, the state's policy was likely to pass just as the income tax first passed in 1861 to finance the Civil War.

## **5.2 Policy Attributes that Affect Potential Preferences: Georgia**

Because this policy is so similar to that of New York, the policy attributes that affect potential preferences described in the New York section also apply here. The only difference Georgia has, as far as policy attributes and potential preferences are concerned, is the fact that the passage of Georgia's policy was even more likely than that of New York's. This was the case for two reasons. The first reason was that at the point prior to

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<sup>155</sup> Arnold, R. Douglas. *The Logic of Congressional Action*. New Haven: Yale UP, 1990. Print.

<sup>156</sup> Ibid.

enactment, we knew that New York's legislation and sales tax collection from online vendors had begun. Thus, policymakers were able to use this as a persuasion strategy to tell constituents that this policy is not only possible in the state of Georgia, but has proven to be possible in other states because New York had already established this policy as well as eight other states.<sup>157</sup> Moreover, the likelihood of this policy passing was improved because Georgia could base its method for how to successfully pass this legislation off the nine other states that had already passed similar, almost identical legislation. Who pays the costs, receives the benefits, and the magnitude of this legislation are the same as previously described above for the state of New York.

### **5.3 Policy Attributes that Affect Potential Preferences:**

Just as with the state policies, there are ways for policymakers to predict public opinion and what challenges they might face while trying to pass potential policies, and what challenges they may face post-implementation. While considering policy attributes that affect potential preferences for the Marketplace Fairness Act, it is important to identify who pays the costs, who gains from the benefits, and the degree to which this policy will have an affect on the public. In terms of costs, all online retailers would be susceptible to collecting and distributing sales tax for any state that decides to meet the Marketplace Fairness Act's requirements and agree to go by this standard of collection. There are forty-five states that currently collect traditional sales tax, and would have the option to require online companies, no matter where they are located, to remit sales tax from consumers collecting their purchases if the Marketplace Fairness Act were to pass

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<sup>157</sup> Nellen, Annette. "Affiliate Nexus and State Sales Tax." San Jose State University, n.d. Web. 13 Apr. 2013. <[http://www.cob.sjsu.edu/nellen\\_a/affiliate\\_nexus.html](http://www.cob.sjsu.edu/nellen_a/affiliate_nexus.html)>.

Congress. Recall too however, that there is a small seller exemption for online companies that make a profit of less than \$1,000,000. Consumers would also be paying the costs, as they are now required to remit sales tax on all most online purchases. As of January 1, 2014, nineteen states require sales tax be collected through “Amazon laws” similar to that of New York and Georgia or through the influence of “Amazon Laws.” In other words, nineteen states collect online sales tax from Amazon either because of a state online sales tax policy or the new established distribution centers, thus physical presence, that came out of threats to implement state “Amazon laws.” Together, these states make up a population of more than 180 million residents, which is more than half of the entire United States population.<sup>158</sup> If more than half of the United States is already required to remit this sales tax on online purchases as a result of their state sales tax policies, then it would not be a significant change for a majority of the country if the Marketplace Fairness Act was passed. For that matter, most states already require that consumers list online purchases as part of a use tax on income tax forms. Thus, like the state policies, the Marketplace Fairness Act would not pose any significant changes to the mindset of most online consumers. The benefits of the Marketplace Fairness Act would be very general benefits, as they would simply increase state budgets and general revenues. If the Marketplace Fairness Act does pass, the magnitude of its passage is huge. For one, the Marketplace Fairness Act would redefine the physical presence standard; thus, dramatically defying previous Supreme Court rulings. Also, the magnitude of this policy is so large because it would enable states to increase state

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<sup>158</sup> Bensinger, Greg. "New Year Rings in Sales Tax for Amazon Shoppers in Three States." *The Wall Street Journal*. N.p., 1 Jan. 2014. Web. 10 Mar. 2014. <<http://blogs.wsj.com/digits/2014/01/01/new-year-rings-in-sales-tax-for-amazon-shoppers-in-three-states/>>.

budgets.

At this level, the passage of the Marketplace Fairness Act or an identical bill in the next Congress, is contingent on who holds the majority in both the House and the Senate. Recall that the Marketplace Fairness Act passed the Senate, held by the Democrats, and died in committee in the Republican held House. With that said, any shifts in majority leadership could have consequences for the Marketplace Fairness Act. Twenty-one of thirty-five Democratic seats are up for election in 2014, most of which are in Republican-leaning states. In order to win the majority, Republicans need to gain six seats. According to the *New York Times*, “Six seats are a lot to gain, and Republicans are at risk of nominating subpar candidates in a number of races. But it would not take all that much to tip the balance toward them,” however, the conditions may not be favorable enough to allow the Republicans to take the Senate majority.<sup>159</sup> According to *The Washington Post*, Republicans have a 44% chance of taking the Senate. Moreover, John Sides of *The Washington Post* argues that “at this moment, the 2014 midterm election seems unlikely to shift the partisan balance of the House much.”<sup>160</sup> With the potential of a shift in majority in the House and Senate, it is unclear how this will affect the Marketplace Fairness Act. In my opinion, if the House shifts to a Democratic majority and the Senate remains the same, then the Marketplace Fairness Act has a strong likelihood of passing. If the Republicans keep their hold of the House and take the Senate, I doubt the

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<sup>159</sup> Silver, Nate. "Can Republicans Win the Senate in 2014?" *The New York Times*. N.p., 20 Feb. 2013. Web. 23 Mar. 2014.  
<<http://fivethirtyeight.blogs.nytimes.com/2013/02/20/can-republicans-win-the-senate-in-2014/>>.

<sup>160</sup> Sides, John. "Republicans Have a 44% Chance of Taking the Senate. But It May Be Much Higher." *The Washington Post*. N.p., 27 Jan. 2014. Web. 23 Mar. 2014.  
<<http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/01/27/republicans-have-a-44-chance-of-taking-the-senate-but-it-may-be-much-higher/>>.

Marketplace Fairness Act would be passed. If the majorities remain as is, I believe it is unclear what may happen to the Marketplace Fairness Act. Although this bill is bipartisan in nature, it is unclear how House Republicans will treat this bill. In other words, many House Republicans see the Marketplace Fairness Act as a new tax, thus making its passage unlikely.

#### **5.4 Alternatives to The Marketplace Fairness Act**

On March 12, 2014, The House Judiciary Committee held a hearing to discuss the issue of Internet sales tax. Chairman of the House Judiciary Committee, Bob Goodlatte oversaw this hearing: “Exploring Alternative Solutions on the Internet Sales Tax Issue.” The witness panel consisted of six individuals who offered alternatives to the Senate passed Marketplace Fairness Act. The panel included: The Honorable Chris Cox (Counsel, NetChoice), Mr. Joe Crosby (MultiState Ass. Inc.), Mr. Stephen P. Kranz (McDermott Will & Emery), Mr. William E. Moschella (Brownstein Hyatt Farber Schreck, LLC), Mr. Andrew Moylan (R Street Institute), and Mr. James H. Sutton Jr. (Moffa, Gainor, & Sutton, P.A.). Together these witnesses identified various alternatives to the Marketplace Fairness Act. These alternatives include origin- sourcing, reporting and use tax collection, International Fuels Tax Agreement, the Webb- Kenyon model, and consumer private reporting.<sup>161</sup> While these alternatives each work slightly different than the Marketplace Fairness Act, the goal of enabling states to collect online sales taxes through a federal policy is still met. While I believe the Marketplace Fairness Act is the

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<sup>161</sup> "Hearing: Exploring Alternative Solutions on the Internet Sales Tax Issue." *United States House of Representatives Judiciary Committee*. N.p., 12 Mar. 2014. Web. 26 Mar. 2014. <<http://judiciary.house.gov/index.cfm/hearings?ID=2F442B02-C3EB-49FA-AE82-2079D732A90D>>.

best, most suitable solution for creating a federal online sales tax collection policy, I believe it is reasonable to consider a federal policy that meets the goal of simplified online sales tax collection. In this project, however, my analysis is limited to the Marketplace Fairness Act.



## Chapter Six: Recommendation for Mississippi

### **6.1 Policy Window: *Problem Stream***

In my quest to assess how Mississippi should become involved in the game of online sales tax collection, I believe it is important to identify the problems that exist in Mississippi in order to determine why a policy, whether state or federal, may or may not be necessary. With the problems Mississippi faces, I believe an online sales tax policy should be created if it could alleviate some of Mississippi's challenges. The problems occurring in Mississippi are very similar to the problems that New York and Georgia faced, which led to the motivation of a state online sales tax policy. These problems include budget shortfalls, lack of tax equity and fairness, lack of a federal policy, and an ineffective current system for online sales tax collection.

According to The *Center on Budget and Policy Priorities*, "With tax revenue still declining as a result of the recession and budget reserves largely drained, the vast majority of states have made spending cuts that hurt families and reduce necessary services. These cuts, in turn, have deepened states' economic problems because families and businesses have less to spend."<sup>162</sup> Unfortunately, Mississippi is one of those states.

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<sup>162</sup> "An Update on State Budget Cuts." *Center on Budget and Policy Priorities*. Center on Budget and Policy Priorities, 9 Feb. 2011. Web. 6 Mar. 2014. <<http://www.cbpp.org/cms/?fa=view&id=1214>>.

In fact, beginning in 2011, Mississippi had to make cuts to both healthcare and K-12 education to accommodate for these budget shortfalls.<sup>163</sup> In terms of tax equity and fairness, it remains true that affluent citizens are much more likely to purchase goods online, thus avoiding any sales tax in Mississippi. This creates a potentially unfair tax burden on those without the means to make online purchases. In 2013, there were 2,991,207 people residing in Mississippi.<sup>164</sup> However, only 59.3% of Mississippians are Internet users.<sup>165</sup> Therefore, there is a strong likelihood that less affluent citizens are less able to make online purchases, thereby requiring them to purchase at traditional brick-and-mortar retailers and pay sales tax to the state of Mississippi. Moreover, like New York and Georgia, Mississippi faces the challenges of an ineffective current system, as residents do not typically include all online purchases on income tax forms as use taxes. Also, Mississippi faces the challenge of there being a lack of a federal policy that would enable the state to collect online sales taxes without nexus.

## **6.2 Conclusion**

The problems associated with online sales tax collection are vast and many. Through my research I have come to understand that no perfect solution exists, but that there is hope of remedying the unfair advantage online companies, such as Amazon,

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<sup>163</sup> "States in Budget Crisis." *The Washington Post*. N.p., Feb. 2011. Web. 3 Mar. 2014. <<http://www.washingtonpost.com/wp-srv/special/politics/state-budget-crisis/>>.

<sup>164</sup> "Mississippi QuickFacts from the US Census Bureau." *US Census Bureau*. N.p., 6 Jan. 2014. Web. 3 Mar. 2014. <<http://quickfacts.census.gov/qfd/states/28000.html>>.

<sup>165</sup> "United States Internet and Facebook Usage State by State." *Internet World Stats*. N.p., n.d. Web. 3 Mar. 2014. <<http://www.internetworldstats.com/unitedstates.htm>>.

enjoy by not having to collect online sales tax. I studied this topic in the hope of identifying a way for Mississippi to collect sales taxes from online purchases. After assessing all I have learned regarding the issue of online sales tax policies, I believe Mississippi should work toward implementing a state sales tax policy similar to that of New York and Georgia, while also continuing to push for a federal policy similar to that of the Marketplace Fairness Act. The economic considerations for making this recommendation far exceed any monetary losses of implementation. If Mississippi is able to pass a state policy similar to New York and Georgia's "Amazon Law," and a federal policy like the Marketplace Fairness Act were implemented, Mississippi should abandon the state policy and utilize the benefits a federal policy has to offer. The Marketplace Fairness Act is better than a state policy because Mississippi would be able to tax even more online companies, not just those with affiliates in the state. Thereby, Mississippi would be able to work with a policy that has no effect on nexus, as opposed to constantly having to work to expand the state's definition of physical presence. Mississippi should work to implement a state policy in the time before a federal policy passes, since we cannot predict how soon until this happens. Given the policy attributes that affect potential preferences for both New York and Georgia, I believe Mississippi should be able to pass such a policy. Moreover, the benefits would likely outweigh the cost.

Ultimately, I believe that the Marketplace Fairness Act is the best solution currently being discussed that would enable states to collect sales taxes that rightly belong to them. Although other alternatives are on the table, the Marketplace Fairness Act seems to be the most widely accepted federal policy, and therefore should be

implemented. Moreover, the arguments against the Marketplace Fairness Act are weak. Seeing as the House Judiciary Committee is considering alternatives to the Marketplace Fairness Act that still accomplish the same goal, it seems inevitable that a federal online sales tax collection policy will eventually pass, sooner rather than later. Areas of future research on this topic include assessing the strengths and weaknesses of the Marketplace Fairness Act and the alternatives identified by the House Judiciary Committee.

We live in a changing world, and if Congress does not make the appropriate changes, online companies will continue to have an unfair advantage in states without online sales tax policies, like Mississippi. Mississippi should implement a state online sales tax policy that expands the meaning of physical presence, but should abandon such a policy when a federal online sales tax policy passes because the goal of collecting online sales tax would be the same.

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